Office-Supreme Court, U.S.
FILED
DEC 8 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 8061

CLARK MARINE CORPORATION,

Petitioner,

versus

CARGILL, INC., CARGO CARRIERS, INC., LLOYD GRAVING AND TOM BETTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BENTON & MOSELEY
114 St. Louis Street
Baton Rouge, Louisiana

DODD, HIRSCH, BARKER, AVANT & WALL
429 Government Street
Baton Rouge, Louisiana

Attorneys for Petitioner

Franklin Press, Inc. *Baton Rouge, La.*

SUBJECT INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	4
STATEMENT OF THE CASE	4
REASONS RELIED ON FOR ALLOWANCE OF WRIT	17
CONCLUSION	37

INDEX TO APPENDICES

JUDGMENT BELOW	Appendix A	39
OPINION BELOW	Appendix B	58
ORDER DENYING REHEARING	Appendix C	59
STATUTES INVOLVED	Appendix D	60

AUTHORITIES CITED

CASES

Page

United Exhibitors v. Twentieth Century Fox Film Dist. Corp. (DC Pa.), 31 F. Supp. 316 ..... 3, 18, 21

United States v. Griffith, 68 S.Ct. 941, 334 U.S. 100 28

United States v. Paramount Pictures, Inc., 85 Fed. Supp. 881 30

Buckeye Powder Co. v. DuPont Powder Co., 233 Fed. 881 (C.C.A. 3, 1915) 3, 18, 22

Federal Trade Commissioner v. Consolidated Foods Corp., No. 422, October term, 1964, cited 85 S.Ct. 1220 ..... 3, 32, 34, 35

OTHER AUTHORITIES

Toulmin's Anti-Trust Laws, Vol. 6, Chapters 3, pages 76 through 103; page 963

United States v. New York Great A & P Tea Company, 67 F. Supp. 636, affirmed (Ca 7) 173 F. 2d 79

United States v. Aluminum Co. of America, 2 Cir. 148 Fed. 2d 416, 432

United States v. Patten, 226 U. S., Page 543, 33 S. Ct. Page 145, 57 L. Ed. 333, 44 L.R.S., N.S. 325

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No.

CLARK MARINE CORPORATION,

Petitioner,

versus

CARGILL, INC., CARGO CARRIERS, INC., LLOYD GRAVING AND TOM BETTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Clark Marine Corporation, a corporation organized under the laws of the State of Louisiana, and at all times during the trial of this case and at the present time in bankruptcy with the Referee in Bankruptcy in the Eastern District of Louisiana, Baton Rouge Division, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered May 7, 1965, sustaining the final judgment of the United

States District Court for the Eastern District of Louisiana, Baton Rouge Division, dismissing plaintiff's action filed under the Sherman Anti-trust Act.

OPINIONS BELOW

The opinion and judgment of the District Court is cited, *Clark Marine Corporation v. Cargill*, 226 F. Supp. 103, and is set out in full in Appendix 1-A, infra. The per curiam of the Fifth Circuit Court of Appeals, which adopted the opinion of the lower court is cited in 345 Fed. (2) 103, and is set out in full in Appendix B, Page 58, infra.

JURISDICTION

This action was brought under the Sherman Anti-trust Act, 15 U.S.C.A. 1, 12 and 15, and was timely appealed from the District Court to the Fifth Circuit Court of Appeals after final judgment, the judgment of the Court of Appeals affirming the lower Court's decision and was rendered May 7, 1965.

An extension of time in which to file an application for rehearing was granted until June 28, 1965, as per order dated May 17, 1965, and an additional forty days extension was granted through August 9, 1965, by order dated June 14, 1965; and an additional extension was granted to September 1, 1965; on September 14, 1965, the Court entered an order denying the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

The following questions are presented by the present application:

(1) Does a bankrupt corporation have a different criteria to meet in proving a violation under the Sherman Anti-trust Act from that criteria which is applied to non-bankrupt petitioners, and in this regard clarification as to an apparent conflict should be given by this Court as between this Court's opinion in *Buckeye Powder Co. v. DuPont Powder Co.*, 233 Fed. 881 (C.C.A. 3, 1915), affirmed 248 U. S. 55 (1918), and the doctrine laid down in *United Exhibitors v. Twentieth Century Fox Distributors Corporation*, 31 Fed. Supp. 316.

(2) Did the Court of Appeals' error by improperly applying the existing principles under the law as to what constitutes a violation of the Sherman Anti-trust Act in this case, basing such an analysis on the lower court's findings of fact and stated positions on the evidence presented, specific emphasis being placed on the vertical integrated nature of the defendant companies that inherently create monopolistic opportunities.

(3) Did the Court of Appeals' error in sustaining the lower court's refusal to allow the plaintiff on rebuttal to enter into an examination of the marine operation that succeeded petitioner's bankrupt corporation in every respect, and thus rebut the contentions of the defendant that the motives of the customers to this industry in choosing their local service was governed by price, quality, service, capital structures and location but rather by hoped for reciprocity, said position of the Court of Appeals and lower court being contrary to the principle set out by this Court's recent opinion in the case of *Federal Trade Commissioner v. Consolidated Foods Corp.*, No. 422, October term, 1964, cited 85 S. Ct. 1220.

(4) Did the Court of Appeals substantially err in accept-

ing the conclusion of the lower court that Cargo Carriers, Inc., obtained a complete dominance of the fleeting and harbor towing business in the Baton Rouge Port as to grain barges because of superior service and management on the part of the said Cargo Carriers, Inc.

STATUTES INVOLVED

The statute involved in this action is the Sherman Anti-trust Act, 15 U.S.C.A. 1, et seq., the pertinent text of which is set forth in Appendix C, Page 60, infra.

STATEMENT OF THE CASE

This is an action seeking damages under the Federal Anti-trust Act, 15 U.S.C.A. 1, et seq. Complainant is Clark Marine Corporation, a Louisiana corporation presently in bankruptcy, and the defendants are Cargill, Inc., a Delaware Corporation, and Cargo Carriers, Inc., a wholly-owned subsidiary corporation of Cargill, Inc., Mr. Lloyd Graving, the Baton Rouge manager of Cargill, Inc., and Mr. Tom Betts, the Baton Rouge manager of Cargo Carriers, Inc. The complaint alleged that these four conspired to monopolize all of the docking, fleeting and switching and repair services in the Baton Rouge Port.

In order to properly understand the matters pertaining to this application, it is felt that it is absolutely necessary to review definitions with which the court might not be familiar, before reviewing the undisputed chronological history of the events leading up to and including the alleged violations of this action, with short summations of the legal positions of both sides on certain facts.

The industry that is the subject of this action is the local fleeting and harbor towing services, and related benefits, above water repairs and cleaning of barges in the Baton Rouge Port. Fleeting and harbor towing, as such, was described by the Court in its Findings of Fact (Tr. 1019, Appendix A, p. 42), as follows:

> "As these large tows (referring to river boats that are pushing a number of barges in the fashion familiar on the Mississippi River) reached the port areas (point of destination of some of the barges in the tow), it is obvious that they could not be simultaneously unloaded into the elevator. (Grain elevator.) Consequently, it was neccessary to 'park' these barges while awaiting their turn for unloading. Consequently, an area convenient to the elevator had to be provided for a sort of parking place for these barges. This area is referred to as a 'fleet,' and because of the fact that these large towboats were rather unwieldly, they were not suitable for 'switching' or moving the barges out of their tow and into the fleet. Consequently smaller harbor towboats are used to 'switch' the barges from the tow to the fleet, and later from the fleet to another town for return to its point of departure or elsewhere. Ordinarily, the owner or operator of the 'fleet' charges a certain rates per day to the owner of the barge for each day that the barge remains in the 'fleet,' and the owner of the switching boat charges either a per hour fee or a per switch fee for switching a barge in or out of the fleet. Also, it is not always practical to unload the barges in the order in which they arrive at the port because of the fact that it is necessary for the elevator to mix and blend different kinds of grain in order to fill certain orders, and consequently, they must take the grain from the barge which is carrying the particular type of grain needed for the mixing and blending then in process." (Comments in parentheses ours.)

Fleeting and switching operators also as a natural outgrowth of that service, offered repairs that could be made to barges not requiring a dry dock, as well as cleaning the barges after they had been emptied. In the case of grain barges, this meant removing the loose grain still remaining. (Tr. 131, 298)

The Court understood (Tr. 1021, Appendix A), that these auxiliary businesses were not to be considered as businesses in which the defendants intended to monopolize; that only the fleeting and switching of grain barges were at issue. Plaintiff's counsel agreed to this, but did not intend for the Court to ignore those activities which are the natural dividends of a fleeting and switching business.

History of Industry in Port: Before 1955, the Port of Baton Rouge was largely oriented to the petro-chemical industry that was generally located north of the City of Baton Rouge, along the east bank of the Mississippi River. At that time, two companies offered services to the marine industry, that is, the carriers who towed into and through the Baton Rouge Port on the Mississippi River. One was Baton Rouge Coal & Towing Company, an old company owned by members of one family, that of J. C. Werner, Jr., one of the witnesses for plaintiff during this trial. This company was primarily engaged in the general towing business on the Mississippi River (Tr. 64, 110), as well as offering the only limited general fleeting area open to the public. The other company was owned by Mr. Kenneth E. Hutton, and offered groceries and supplies to the tugboats that plied their trade through the Baton Rouge Port. Mr. Hutton also appeared as a witness for plaintiff in this action, and also has an action pending the outcome of this case under the Sherman Anti-trust Act. There

were other fleeting areas, but privately owned for the use of their own equipment, Esso Standard Oil having such an area (Tr. 94). The fleeting and harbor towing business was admittedly a very limited activity in the Baton Rouge Port at that time (Tr. 65, 66, 115, 268).

The Baton Rouge Port Commission, subsequent to the year 1955, in an effort to increase the growth of the Port, voted sufficient municipal bonds to finance the construction of a general cargo dock facility, a grain elevator and dock facility and a barge terminal. It was hoped by building these facilities to increase international trade into the Port, since the Baton Rouge Port is a so-called deep water port, available to oceangoing vessels. The barge terminal dock was located in the northern part of the harbor on what is referred to throughout the trial as the "Devil Swamp Canal," the same site of Plaintiff Clark Marine's first operation. In the center of the harbor, some five miles from the Devil Swamp Canal, was located the general cargo dock and the grain elevator, both of these docks being available for deep water, as well as barge traffic. (See defendants' Exhibits 1, 2, and 3, for a complete picture of the locations of these various dock facilities.)

The grain elevator was initially constructed to house 2.5 million bushels of grain as of the date it opened in 1955. Upon its completion, the dock and elevator were turned over to the Cargill Company on a long-term lease basis. (Court's Finding, Tr. 1020, Appendix A, p. 42).

Cargill, Inc. is a huge corporation principally engaged in the buying and selling of various types of grains and other bulk commodities and through subsidiaries, it engages in sev-

eral other businesses, usually of a related nature, such as stevedoring, towing, fuel sales, fleeting, etc. It utilized the elevator at the time it opened, as it has throughout all of the times pertinent to and considered in the trial, as a point of assembly of grains for international shipment. This grain was collected principally from its many elevators operated throughout the northern portion of the Mississippi River system, including all of the navigable connecting rivers of the Mississippi River, as well as elevators in areas not accessible by water, but by rail. After arrival in the port, the grains are blended and placed upon oceangoing vessels for international delivery, as ordered. (See Court's Findings, 1018, Appendix A, p. 42).

The elevator was and is now and has continued to be the only grain elevator in the Baton Rouge Port. (Tr. 24)

Cargill, Inc., has a wholly-owned subsidiary known as Cargo Carriers, Inc. (hereinafter referred to as "CCI"). This company is given the sole responsibility of moving the commodities owned or controlled by Cargill, Inc., on the river system (Tr. 22,585). As such, it operates barges and towboats and, in fact, operates what is believed by them to be the largest river towboat in the world (Tr. 612). This equipment is available first for the movement of Cargill commodities, but is also utilized in competing with other river transportation companies in carrying commodities for customers other than Cargill. CCI could not carry all of the commodities of Cargill and as a result a large portion (60%—see Court's findings Tr. 1018) of such business was contracted for from the other carriers on the river system, constituting Cargill as a very large shipper on the river.

It was admitted by the defendants that CCI personnel, in the furtherance of its responsibility to Cargill, also were directly and solely responsible for the placing of all such orders for Cargill commodity movements not handled in their own equipment with the identical towing companies that constituted most of the customers in the fleeting and towing business in the Baton Rouge Harbor (Tr. 22). Thus, all of the carriers of grain destined for the Cargill elevator, other than CCI, when given shipping orders were placed in the position of reciprocation by using the local harbor towing service of CCI. It was this power to place Cargill shipping orders which Plaintiff asserts gave CCI the illegal power of responsibility over these shippers forcing them to use their local fleeting and harbor services. When Cargill took possession of the grain elevator facilities in 1955, CCI likewise established offices in the Baton Rouge Port, in order to coordinate the movements of the Port, as well as directly into the elevator.

As a direct and sole result of the presence of the grain elevator in the Port, two new operations were created in 1955. Both of these companies were the outgrowth of the existing two principal operators in the Port. The first such company to be created was Louisiana Marine Repairing Service Company. This company offered fleeting and harbor towing services, and utilized boats owned by Baton Rouge Coal & Towing. Mr. Johnny Jackson was a part-owner of the new company and apparently the balance was owned by the same owners of the Baton Rouge Coal & Towing Company, the J. C. Werner family (Tr. 67, 88, 1021, Appendix A). The second new fleeting and harbor towing business began with the expansion of Mr. Kenneth Hutton's operation to include fleeting and harbor towing (Tr. 268, 269). The Court, in its Findings of

Fact, on Page 1024, Tr., Appendix A, p. 45), found that by April 1, 1959, the date CCI entered this field with its own operation besides the two companies named above engaging in the fleeting business:

> "Also a Captain Joe Hightower and a Captain Bert K. Kleinpeter each had a small boat that was suitable for switching and was available, when needed, to perform harbor work."

It is not seriously disputed that the grain business in the Baton Rouge Port was the principal commodity that governed the fate of the fleeting and harbor towing business. Finding of the Court (Tr. 1020, Appendix A, p. 41). The evidence showed that of the remaining non-grain barges, relatively few were available to fleeting operators offering a public fleeting area (Tr. 90, 115).

In 1959, the elevator's capacity was increased from 2.5 million bushels of grain to 7.7 million bushels of grain, said project again being financed by public funds in conjunction with lease agreement with Cargill, Inc. During the same time and partially because of the increase in capacity of the elevator, CCI contemplated entering into the fleeting and switching business and submitted a request for permission from Cargill to allow them to establish such an operation in the Baton Rouge Port, not only for barges that it owned or directly controlled, but likewise for any other companies, who wishes to utilize such services in the Baton Rouge Port. (Tr. 739, Exhibits P-14, P-16.)

The Court found as a matter of fact that approximately thirty-five (35%) per cent of the grain received by Cargill, Inc., to the elevator moved to the elevator by railroad car

and that the remaining sixty-five (65%) per cent of the grain received moved into the port area and into the elevator by river barge. Of the sixty-five (65%) per cent of the grain moving in barges owned and managed by CCI, approximately 30% to 40% was carried by CCI. The Court actually found 40% (Tr. 1018, Appendix A, p. 41), but defendant, Mr. Lloyd Graving, in his testimony, estimated 30% to 40% (Tr. 546).

The Court also noted that some 115 million bushels of grain were recorded as having turned over after the increase of the elevator during one year's period. These undisputed findings thus show some 42 million bushels of grain, more or less, shipped into the Cargill elevator by companies other than CCI, after the increase in capacity of the elevator. It was a portion of this business that CCI felt it could get in order to insure a profitable operation in the Baton Rouge Port. (See plaintiff's Exhibit 14, Tr. 744). It is also this business upon which this action is largely based.

Before granting permission to CCI to enter the said fleeting and towing business, Cargill required CCI to negotiate with the Baton Rouge Port Commission as to whether or not it intended to enter the fleeting and harbor towing business, basing the request solely on what they considered very poor service then being given by the existing companies (Tr. 741). The Commission indicated it had no such intention (Tr. 1023, Appendix A, p. 45). CCI, therefore, received permission from Cargill, Inc., to start its own business. Accordingly, a form letter was mailed to prospective customer towing companies under the signature of Captain Donald S. Wright, the then operations head of CCI (See Exhibit P-16), dated February 4, 1959, announcing the opening of the new fleeting service as of April 1, 1959. Other solicitations were made

by certain other employees of CCI. These solicitations were not limited to grain fleeting only. Exactly who did the soliciting is somewhat at issue.

Regardless of the question of who did solicit business, there is no dispute as to the fact that solicitation was carried out and continued to be carried out by the defendant, CCI, by personal contact and letter, and that this same company, CCI, was solely responsible for the issuance of all of the excess towing contracts to all of the customers who carried grain, of their fleeting and harbor towing business in the Baton Rouge Port.

It is reiterated that it was Clark Marine's position that it was this particular known combination of authority to give towing contracts that makes it impossible to ever directly compete in a free market with CCI for services to be rendered these same towing companies in Baton Rouge who receive these contracts, even in the absence of any threats that they will lose this business if they do not use such local service (See Reasons for Writs No. 2).

Regardless of how solicitations were carried out, it is undisputed that within a very short time, all of the grain-carrying barges in the Port were fleeted and switched by CCI, and continued to be fleeted, except for an occasional barge in the fleet of the Baton Rouge Coal & Towing until Clark Marine obtained some business in October, 1961. The actual takeover initially took from thirty to sixty days (See Tr. 71, 76, 279, 393, and Judge's Finding [Tr. 1034, Appendix A], also Exhibit P-18.) It is also undisputed that Kenneth L. Hutton, as well as Louisiana Marine filed bankruptcy proceedings after each lost his portion of the grain business

(Tr. 77, 88). Kenneth L. Hutton subsequently filed an anti-trust suit similar to the instant case against Cargill and CCI, said action still pending the outcome of this case (Tr. 315). Captain Kleinpeter and Captain Hightower likewise left the Port (Tr. 314).

The Court found nothing unusual about this remarkable success, and held that it was the result of good management and the rendering of better service (Tr. 1026, Appendix A, p. 53). Later the Court noted again that CCI (Tr. 1034, Appendix A, p. 53):

> ". . . did acquire practically all of the fleeting and switching business in the Port of Baton Rouge insofar as grain barges are concerned."

After approximately the first month's operation by CCI of its new fleet, the evidence is uncontested that the vessel used for the switching of their fleet was chartered from Baton Rouge Coal & Towing on a full found basis (Tr. 72), subject to the direct supervision of the CCI office, and using the same crews used by Louisiana Marine Repairing Service in its switching operation (Tr. 73). Thus, the sole remaining so-called competitor of CCI, until the appearance of Clark Marine's operation in the harbor, also furnished the vessel and extra vessels used to handle all of the fleeting moves in the CCI operation, solely for the CCI fleet to the obvious exclusion of Baton Rouge Coal & Towing, using the same crews and equipment supposedly previously guilty of rendering poor service (Tr. 85, et seq).

CCI established, in the use of their fleeting boat during all times pertinent to this action, a standing instruction which established a priority for use of their harbor boat. This priority

placed the grain elevator's needs first, CCI's tows second, other customer large line tows third, and so on. (See Exhibit P-12, Betts Tr. 403.) If further boats were needed, they were to be called, if one could be found, as needed, but only one full time boat was kept by CCI's operation (See Betts, Tr. 414; J. Smith, Tr. 463.)

CCI continued to operate the sole grain fleeting and switching business until the appearance of Clark Marine in January of 1961. (Defendant, Tom Betts, Tr. 393).

It is undisputed that in March, 1961, Clark Marine purchased a towboat and began offering harbor towing and switching services, as well as fleeting areas at its location, immediately adjacent to the Baton Rouge barge canal terminal in the Devil Swamp area. In conjunction with the offering of the services of fleeting and harbor towing by Clark Marine, a steam cleaning and general repair service had previously been introduced, said steam cleaning and repair business being offered on all types of barges from its opening date of January of 1961. It is during the period of time between March of 1961 and September of 1961, before Clark Marine actually moved its operation to the center of the harbor immediately across from the CCI operation that Clark Marine alleges that they were completely blocked by the defendants from receiving any harbor towing, except that which CCI itself dispatched to it, and also any fleeting of barges. During this period of time, it is undisputed that Clark Marine had no fleeting business of barges whatsoever (Tr. Clark, 157, Garner, 362), even though it was immediately adjacent to the Baton Rouge barge canal dock where some two hundred eighty-nine barges, more or less, were docked during the year 1961. (See Exhibit P-11.)

The Court adopted defendants' explanation of the lack of business and held that during this period Clark Marine, because of its location, was not in competition with CCI's operation, a conclusion vigorously disputed in this writ, especially as to towing in the harbor which, of course, is free to operate wherever the river flows. It was established by testimony and exhibits also in a fashion undisputed that Clark Marine's only harbor switching during its stay in the Devil Swamp Canal came with the direct authority of CCI's dispatching office, when extra services were needed, and that invoices for such services went to only CCI, and not to the customers for whom the work was performed. (See Defendants' Exhibits 100, 101, 102, O. V. Smith, Tr. 339, Garner, Tr. 357.) It is further shown by the superintendent of pilots for CCI, Captain John Smith's undisputed testimony, that Clark Marine was considered a competitor at all times it was in existence by him and defendant Betts. (Tr. 463, et seq.)

Clark Marine opened its operation at what is termed "Red Dog Landing" at the center of the Port, adjacent to and across from CCI, on September 7, 1961 (Court's Findings, 1030, Appendix A, p. 49). On September 15, an order was issued prohibiting the Clark Marine vessel from docking barges at the elevator. On September 16th, the order was rescinded. (See answer to plaintiff's Interrogatories, No. 24.) On September 22nd, Clark Marine called upon officers of Cargill in both Minneapolis, St. Paul, as well as in Baton Rouge, and accused them of preventing Clark Marine from receiving any business in the Baton Rouge Port, and further stating, through its representative, that some barge lines were afraid to use their services, even though they had indicated an interest to do so. (See defendant, Graving, Tr. 561, and Clark, Tr. 167.) After assurances that Cargill did not have such a policy, an

attempted meeting of the barge lines with Cargill was set up to assure the said towing companies on this point, but Cargill and one barge company refused to take part. (Defendant Graving, Tr. 566, 567). After these conferences, Mr. Heininger, very able chief counsel for Cargill in this trial, was retained to protect Cargill's position in the Port (Tr. Heininger 492). After this attempted effort, Clark Marine did begin to receive most of the harbor towing and fleeting business of American Commercial and Mississippi Valley Barge Lines and business from CCI itself. This business was not actually received until **the latter part of October, 1961. (See plaintiff's Exhibt 24**, which shows defendant's own computation of plaintiff's fleeting income; **also Garner, Tr. 359, Clark, 167.)** Clark Marine, thereafter, experienced some increase in business on all fronts, although not increasing its number of grain-carrying customers, but not enough to avoid bankruptcy in July of 1962.

Clark Marine filed a petition under Chapter X of the Bankruptcy Act in an effort to reorganize and refinance its operation on May 25, 1962, said action having the effect of actually placing the company in the hands of the district judge, G. Gordon West, who ultimately was the trial judge in this action. Judge West under authority of said reorganization actually operated the company until on his own motion he placed the company in bankruptcy on July 11, 1962. Shortly before the actual trial commenced the jury was waived by joint motion for both parties. The court then on its own motion split the issues limiting the first trial to the question of whether or not the defendants had in fact violated the Sherman Anti-trust Act, with the question of damages to be raised later if a violation was found.

It has been the contention of Clark Marine that the alleged violation of the Sherman Anti-trust Act first resulted when CCI went into the fleeting and harbor towing business and created a complete monopoly within the Port after April 1, 1959, and that this monopoly, in the form of a continuing violation, was directly felt by the said corporation during the period of time between **March of 1961 and October of 1961**, and continued thereafter even though not as abusive as prior to that date, and still continues in the Port of Baton Rouge through the date of trial.

It was defendant's principal contention that in order to prove a violation of the Anti-trust Act Clark Marine had to show it was properly capitalized, the desired business was profitable; that Clark Marine used good business judgment and that the bankruptcy resulted from the said violation; that the defendants actually made no threats of withdrawing contracts for towing, or giving contracts if their local services were not used; and finally that the success that resulted in the actual dominance of the fleeting and switching business was the natural outgrowth of good management and superior service on their part.

The Court ruled in the defendants' favor on all points.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. Does a bankrupt corporation have a different criteria to meet in proving a violation under the Sherman Anti-trust Act from that criteria which is applied to non-bankrupt petitioners, and in this regard clarification as to an apparent conflict of law should be given by this Court as between this

Court's opinion in *Buckeye Powder Company v. DuPont Powder Co.*, 233 Fed. 881 (C.C.A. 3, 1915), affirmed 248 U. S. 55 (1918), and the doctrine set out in *United Exhibitors v. Twentieth Century Fox Distributors Corporation*, 31 Fed. Supp. 316.

Stating the proposition another way:

Does a bankrupt plaintiff in proving a violation of the Sherman Anti-trust Act with the question of quantum removed by the Court's splitting of the issues for purposes of trial have to establish as the elements of such an action the following facts:

(1) That the business in question be considered completely separate and apart from other related businesses and in this manner make a showing of potential profit to the plaintiff had the plaintiff been successful in obtaining business in the absence of a violation of the Anti-trust Act.

(1) That the plaintiff be required to prove that it was a properly capitalized corporation at all times pertinent to the trial of the case.

(3) That a plaintiff in bankruptcy be required to prove its bankruptcy was caused principally as a result of the violation.

(4) That the management of the plaintiff's operations were prudent and wise.

This case presents an unusually clear opportunity for this court to determine one way or the other precisely how much a bankrupt plaintiff's internal problems have to do with the

proof of the violation of the Sherman Anti-trust Act by its competitors illegal activities even though such internal problems have no connection with such activities. This is made clearly possible here by the lower court's splitting the issues on its own motion just prior to the trial of this case. The Court's stated purpose in doing this was to eliminate any consideration of evidence that did not bear directly on the question of the existence of activities on the part of the defendants toward the plaintiff that would constitute a violation of the act. The question of the relative merits of the actual services rendered by the plaintiff as compared to defendants is not an issue in this regard since plaintiff obtained no business at all for a major portion of its existence, and then when it did, no question was raised as to their competency since their two customers did not leave them.

The next obvious question is whether or not such a determination is of sufficient far-reaching importance to be considered by this Court in its already overburdened workload. We take the position that it is for several reasons. (1) The authorities on this point appear to be in hopeless conflict or at least to apply separate criteria to plaintiffs that are bankrupt from those that are not. It is our position that such a position is unjustified under the Act and prejudicial to bankrupts and should not be allowed to continue; (2) if the lower court's opinion is allowed to remain unchanged and uncommented on, it would have the effect of defeating the purpose of the Act by making the successful prosecution of actions of this kind by bankrupts a virtual impossibility because of the resulting unrelated burdens of proof added and prejudicial nature of such burdens; (3) in the instant case the rights of the plaintiff have been greatly injured under the circumstances

and the actual trial and judgment and this injustice should be rectified.

Contrary to the trial court's original reason for splitting the issues it did allow the defendants full range in attempting to examine plaintiff's financial problems. A review of this record will show that a vast majority of the defendants exhibits (which exceed one hundred in number), and a great portion of the testimony presented by the defendants in defense of this action addresses itself solely to the financial condition and management decisions of the plaintiff, all of which could have no bearing on the defendant's activities. These matters all came in under objection of plaintiff as being inconsistent with the court's splitting of the issues. These objections were made in the conference which immediately preceded the trial when the defendants' proposed introduction of this evidence was made known to the judge and also during the trial (Tr. 718) when appropriate. The Court allowed all evidence presented under this heading to be introduced into the record and repeatedly stated that he would consider only that which was pertinent to the issue before the court and give no consideration to evidence on the question of quantum. See Tr. 829 as an example.

To the contrary, a review of the lower court's findings of fact and conclusions of law will show that the court discussed at length its belief that Clark Marine was badly capitalized and incredibly concluded that it would not have survived even if it got all the fleeting and harbor towing business in the port, clearly illustrating the devastating effect this evidence had on the mind of the judge. This same question had previously been submitted to the court during extensive motions for summary judgment which were denied and plaintiff at

that time and at all times thereafter relied upon the case of *United Exhibitors v. Twentieth Century Fox Film Distributing Corporation* (D.C. Pa. 31 Fed. Supp. 316; also cited in Toulmin's Anti-trust Laws, Vol. 6, page 963). In this case the Court even where no specific damage was prayed for concluded that where an established conspiracy is shown, nominal damages can be added to the injunctive relief sought. Thus, even in the absence of any evidence of actual monetary losses in the face of an established violation of the Act, this court would have no difficulty finding a basis for granting relief with damages.

Relying upon the rationale of this authority, and the court's stated purpose, when the court split the issues plaintiff dismissed witnesses that had been called to testify on the question of quantum, including some that were out of state, and otherwise stopped any efforts to prepare to meet this requirement. It was plaintiff's repeated stated position during the trial and **one which was never overruled by the trial court** that this was all that was required of it in the consideration of the issue before the Court. Why else would the Court have split issues if he did not mean to limit the evidence.

Admittedly, the question of precisely why Clark Marine went into bankruptcy has its relative importance in the ultimate determination of this action if a violation was found. But regardless of what the answer or answers to that question might be, it could in no way have had even the most remote influence on the pure issue of whether or not plaintiff was injured by the illegal actions of the defendants in the management of their business affairs. To state it another way, Clark Marine's financial structure, be it strong or weak, cer-

tainly could not have influenced the actions, one way or the other, of the defendants in its use of monopolistc powers in violation of the Sherman Anti-trust Act. The only question left by the court's splitting of the issues was whether or not defendants were singularly or jointly guilty of a violation of the Sherman Anti-trust Act and whether the plaintiff suffered as a result of such illegal actions. **How much Clark suffered is not an issue in the case, if the issues are to be truly split.** Upon splitting the issues in this fashion, the case should have automatically assumed much the same character of an action brought by the Federal Government subject only to the plaintiff showing a right of action by being a competitor in the business monopolized.

Defendants cite with some merit the case of *Buckeye Powder Company v. DuPont Powder Co.*, 223 Fed. 881 (C.C.A. 3, 1915), affirmed 248 U.S. 55 (1918). This case, although not in point of fact, did deal with the admissibility of evidence of the type considered here as being a portion of the charge to the jury and was allowed on the basis that the plaintiff's **motives** might be relevant **to the question of liability** and that the jury might consider the evidence "on the question whether the plaintiff's failure was due to the defendant's oppression or to the plaintiff's incapacity." (248 U.S. at 64). Here the plaintiff was also a bankrupt company.

Thus it would seem that on the one hand the company that is not bankrupt need not prove even one dollar's worth of loss, just a showing of injury, in some instances, in order to get not only injunctive relief but a monetary award while on the other hand the bankrupt must be ready to prove from the point of hindsight many elements that have no direct bearing whatsoever on the existence of the violation of the Anti-trust Act, even being subjected to a **motive** examination.

We take the position that this Court should clearly state that direct damage is all that need be proved in order to lay the groundwork for proving an action in violation of the Sherman Anti-trust Act. Next, we take the position that it is contrary to reason and the intent of the statute to require proof of profit, arbitrarily, since, as in the instant case, the service considered was more in the category of a reduction of an overhead rather than as a pure profitable business. The very known existence of a monopoly of the kind considered is sufficient to discourage investors from making even the usual effort for saving a company otherwise suffering from financial problems. We take the position that capitalization and business judgments have no bearing whatsoever at this point in a cause of this kind.

A bankrupt plaintiff faces monumental problems in these cases. It is practically impossible for them to retain able counsel with experience in the anti-trust field, the present case being no exception. It is likewise also almost an impossible problem to raise sufficient funds to properly investigate facts and to meet the never-ending energetic defenses that a large, wealthy corporation's many able counsel can present; again this case being no exception.

To add to these burdens, the completely extraneous requirements of explaining and defending every act on the part of a panicked management faced with probable bankruptcy is to present such a prejudicial, irrelevant and overwhelming burden as to make the Anti-trust Act meaningless to such a bankrupt.

2. Did the Court of Appeals' error by improperly applying the existing principles under the law as to what constitutes a violation of the Sherman Anti-trust Act in this case, basing such an analysis on the lower court's findings of fact and stated positions on the evidence presented, specific emphasis being placed on the vertical integrated nature of the defendant companies that inherently create monopolistic opportunities.

It is plaintiff's understanding of the law applicable to this case that in order for plaintiff to have established a violation it was required to show that a power of monopoly or unreasonable restraint of trade in vertically integrated companies did exist. After the proof of such existing power is shown, then the plaintiff would be required to show that a resulting restraint of trade or monopoly affecting the plaintiff took place. Upon completion of the proof on these points, it is plaintiff's understanding that a violation of the Sherman Anti-trust Act is then presumed to exist, regardless of the intent of the parties or the stated purpose for the combination.

It is plaintiff's contention here that the court actually made findings on basic facts which, when applied to existing law and reason, require a conclusion that these two defendants, that is, Cargill and CCI, are in fact violating the Sherman Anti-trust Act and did violate the said Act during the existence of Clark Marine Corporation to that company's detriment.

There is no dispute that Cargill and CCI are vertically integrated companies, and that CCI, in effect, had the power to threaten the loss of towing contracts over many of the

carriers if it chose to use it, arising out of the dual role exercised by it in both engaging in the local fleeting service and placing contracts with customers of that fleeting service on behalf of Cargill, Inc., for the shipment of all of Cargill commodities. As a matter of fact, the vertical nature of the companies and the dual role of CCI are admitted by defendants in the pre-trial order (Tr. 22). They simply deny ever using this position to obtain business by the use of threats that contracts would be withheld or given if the local service was or was not used, and further deny that they would have been effective if they were used.

That the contracts and solicitations by CCI for the handling of fleeting and towing operations generally were by the same personnel who were authorized to make cargo contracts with these same customers is, we submit, under the facts practically the equivalent of a legal conclusion. The Court does not deal with this point under the findings of Fact as the Court in its estimate of the legal principles governing simply disregarded the relevance of this dual role, manifestly relying upon the viewpoint as revealed by the Court's comments, that unless plaintiff's could show the intent to use or the actual use of this dual role conjointly by threats or promises or some other form of intimidation, no legal remedy was available to Plaintiff. The feeling of the Court as to the dual role itself is plainly established in its comments.

These comments were made following the testimony of Gayle H. Chapman and Captain Bogle Caplener of independent grain carrier companies dealing with CCI, and filing of affidavits of other barge line officers in which these gentlemen stated in effect that when they moved their business to CCI in 1959, they did so without giving any serious thought

to the dual capacity of "reciprocity" in the hands of CCI. (Tr. 666, 667, 846, 847).

Following the evidence, Mr. Avant, for the plaintiff, was arguing with the Court as to the admissibility of rebuttal intended to show that these men simply were not telling the truth about their company's policies in this regard. We quote a colloquy between Mr. Avant and the Court from page 875 of the transcript:

"Mr. Avant:

> "Your Honor, the purpose in calling Mr. Nelson is simply this, Mr. Caplener testified, and other representatives of barge lines have testified in this case by affidavit, in lieu of requiring them to be here, that they did not consider—Mr. Caplener said they did not even consider the business that they may do with Cargill.

"The Court:

> "Of course, in that respect, Mr. Avant, that is completely irrelevant and immaterial. I am sure they considered it. If they didn't, they were poor businessmen, but they have no obligation not to consider it. **I am only interested in knowing what Cargill and Cargo did to make them feel that they must do business with them, but I can't quite conceive of any barge line not considering the fact that Cargo is a customer as well as a competitor."** (Emphasis ours)

Again, on Page 877, the dialogue continues:

"Mr. Avant:

> "It tends to show that they do have a policy and that

> they are influenced to a large extent by the fact that they have business relations.

"The Court:

> "I am sure they do. I said they would be mighty poor businessmen if they didn't. I think it is completely irrelevant and immaterial. I am interested in whether or not there were threats by the defendants against these plaintiffs. **I don't care how much they considered it. I think it is rather ridiculous to assume that they did not consider such things."** (Emphasis ours)

These comments came at the conclusion of the trial and by this time, both sides had submitted briefs on the law and argued at length, and the Court was fully informed on the contentions of each side. Further, it should be noted that nothing in the finding of the Court rebuts these statements. (See also like comments by the Court, Tr. 502, 514, 517, 523.)

The fact the Court plainly recognized that any good businessman would take into account such integrated interests despite what the witnesses claimed to the contrary serves to emphasize the deep conflict between the plaintiff and the Court as to the legal principles governing this case. The Court simply dismissed the whole business upon the false legal premise that although there would be this conjoint interest (by its very nature economically indivisible) it would not afford any basis for legal relief unless it were connected with a threat or a promise or some other form of intimidation.

For the defendants to actually attempt to prove to the contrary is the recognition by their many able counsel that

the Court was on thin ice legally in ignoring the relevancy of this point. **It is likewise a further indication of the absolute control exercised by these huge companies over their customers, in being able to get otherwise responsible businessmen to make such comments which the Court completely rejected as "ridiculous" and which the plaintiff rebutted with such ease.** (See Prewitt Nelson's impeachment of Captain Caplener, Tr. 884, 885.)

It is plaintiff's position that the lower courts are apparently completely mistaken concerning the law on the subject and had they understood the law properly in conjunction with this clear understanding of the truth of reciprocity, they would have found a violation of the Act. Plaintiff contends that the very existence of the dual role obviates the necessity of a direct threat. **If an overt act is needed, then the act of soliciting for business in Baton Rouge, when combined with the giving of towing contracts for Cargill commodities, is act enough.**

A case that directly refutes the lower court's position in this regard is the landmark case of *U. S. v. Griffith*, 68 S. Ct. 941, 334 U.S. 100, where buying power as a monopolistic power was considered in overturning the lower court's finding for the defendant of no conspiracy and

> "no attempt to compel distributors to grant them privileges not granted their competitors, or which gave them any substantial authority over their competitors . . ." (See Page 944.)

The Supreme Court, in ruling a violation of the Act in the face of this finding of the lower court stated:

> "A man with a monopoly of theaters in any one town

commands the entrance for all films into that area. If he used that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places. He need not be as crass as the exhibitors in United States v. Crescent Amusement Co., supra, in order to make his monopoly power effective in his competitive situations. **Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns where he has competitors, the effect is likely to be the same where the two are joined. When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire.** And even if we assume he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did. United States v. Pattern, supra, 226 U. S. Page 543, 33 S. Ct. Page 145, 57 L. Ed. 333, 44, L.R.S., N. S. 325." (Emphasis ours)

We consider this case governing on the instant case, and completely parallel.

Notice here no threat was actually found to have been made by defendant, yet a violation of the Act was found, which is the very opposite view of that applied by the lower court in the instant case. The effect of the combination of his buying power was felt to be present in the negotiations, even though no mention of a threat was proved. Why threaten a potential customer when it is not needed to get his business?

As to the question of whether a monopoly did result,

the Court, in the instant case, found that "practically all of the fleeting and switching business in the Port of Baton Rouge insofar as grain barges are concerned . . ." was acquired by CCI (Tr. 1034, Appendix A, p. 53). We feel justified in adding that a company with "practically all" of a certain type of business is a company that enjoys a monopoly. (See also Tr. 71, 76, 279, and 393.)

In discussing a situation not too different from the problems in the instant case, Judge August Hand in *United States v. Paramount Pictures, Inc.*, 85 Fed. Sup. 881, on Page 885, states:

> "As further reasons for directing a reconsideration of the above issues, we were asked to determine whether the vertical integration of the major defendants, which was held not to be unlawful per se, was conceived with an intent to monopolize or was of such a character as to confer a known monopoly power. **If the power be established, a specific intent to monopolize need not be shown.** As was said by Justice Douglas in United States v. Griffith, 334 U.S. 100, 105, 68. Ct. 941, 944, 92 L. Ed. 1236, and referred to in United States v. Paramount Pictures, Inc., 334 U.S. 131, 173, 68 S. Ct. 915, 92 L. Ed. 1260: 'It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. **It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements.** United States v. Patten, 226 U.S. 525, 543, 33 S. Ct. 141, 145, 57 L. Ed. 333, 44 L.R.A., N.S. 325; United States v. Masonite Corp., 316 U.S. 265, 275, 62 S. Ct. 1070, 1076, 86 L. Ed. 1461. To require a greater showing would cripple the Act. As stated in United States v. Aluminum Co. of America, 2 Cir., 148 F. 2d 416, 432, 'no monopolist monopolizes unconscious of what

> he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the act falls short of the results condemned by the Act.'" (Emphasis ours)

Justice Hand found defendants owned at least 70% of the first run theaters in 92 cities in the country.

> "These figures certainly indicate, when coupled with the strategic advantages of vertical integration, a power to exclude competition from these markets when desired . . . If an intent to exercise the power be thought important, it existed in this case. . . ." (At Page 894.)

Cargill had 100% dominance in the Port of Baton Rouge in the grain-storing business. CCI soon enjoyed "practically all" of the fleeting and switching of grain barges. It is submitted that the lower Court's own findings establish a pattern recognizable as being classically like these well-established landmark cases.

It is respectfully submitted that from the above authorities the lower court should have considered the inevitable and proven stifling effect the combination gave to the local industry in fleeting and harbor towing. The question that should be answered was whether or not the combination stifled and restricted competition, and the answer, using the lower court's own observations, is that insofar as the plaintiff, the four operators who were first engaged in this business and the present competitors are concerned, all uniformly are unable to match the ever-tantalizing effect of a hoped for bonus of more towing contracts as a result of using the local services of CCI. Thus, from the facts found by the lower court, a classic case of a violation of the Anti-trust Act is shown, and the decision is therefore in substantial conflict with rulings of this Court.

3. Did the Court of Appeals' error in sustaining the lower court's refusal to allow the plaintiff on rebuttal to enter into an examination of the marine operation that succeeded petitioner's bankrupt corporation in every respect, and thus rebut the contentions of the defendant that the motives of the customers to this industry in choosing their local service was governed by price, quality, service, capital structures and location but rather by hoped for reciprocity, said position of the Court of Appeals and lower court being contrary to the principle set out by this Court's recent opinion in the case of *Federal Trade Commissioner v. Consolidated Foods Corporation*, 85 S. Ct. 1220 (1965).

As shown the principal defense presented by defendants was not to deny that the power of reciprocity did exist, but simply to say that it was never used and that the customers of the fleeting and harbor towing business actually gave no real consideration to reciprocity. The defendants' contention was that this was in every sense of the word a market as free as any that had no reciprocity. In order to rebut this evidence, plaintiff attempted to open an examination of the fate of a company that in every respect succeeded the plaintiff's operation excepting only its financial problems. We refer to a company known as "228 Terminal Services, Inc." principally owned by Mr. Prewitt Nelson.

When the question of going into the operation of this successor of Clark Marine was originally raised in the pretrial order the trial court informed all parties that it con-

sidered this company after the fact and of no relevancy and would therefore not allow the evidence to be introduced by the plaintiff. The defense had prior to the beginning of the trial caused to be issued an extensive and detailed subpoena duces tecum to Mr. Nelson because of this stated purpose. When the Court stated it would not allow such evidence, the plaintiff acquiesced in this ruling and in order to accommodate Mr. Nelson lodged an objection to the subpoena at the opening of the case which was allowed by the court. The right to use Mr. Nelson on rebuttal however was reserved and he was excused from the court room.

When the defense had completed its presentation and had raised the defenses shown concerning the lack of effect of reciprocity, the plaintiff then thought it quite relevant to view just how valid these very elements had been as they applied to the succeeding company. Accordingly, Mr. Nelson was called, and on this point the court ruled that he could not testify. An offer of proof was then made into the record (trial record 888), with the court granting the usual right to submit a deposition on the subject as a substitution for the oral offering. An attempt to take this deposition was made immediately after the trial was completed but counsel for defendants requested and obtained a delay from counsel for plaintiff because of personal inconvenience. When again the deposition was attempted the record had been filed in the Court of Appeals and an objection was filed by the defense to the untimely taking of this offer of proof. An answer to this objection was made by the plaintiff showing the earlier effort to take this offer of proof and claiming a violation of confidence on the part of counsel for the defense. The Court of Appeal then ordered that the deposition be taken and accordingly and in due course it was done.

During the argument before the Court of Appeals a major portion of plaintiff's time was actually consumed in the court's considering whether or not the deposition was properly before the Court, and ultimately this was the only point given any comment in the per curiam handed down by the Court of Appeals. In this fashion the issue was clouded by this procedural matter and is discussed here only to attempt to direct this Court's attention past this to the real issue of whether or not the plaintiff had the right on rebuttal to go into Mr. Nelson's operation, a point which is validly before this court as it was before the Court of Appeals, regardless of the timeliness of the taking of the deposition by reason of the offer made in open Court.

It was and is our point that if Mr. Nelson's operation were properly financed, had a better location than defendants, better equipment, equal or better prices and the usual elements to be found in a free market consideration and still could not get one **new grain towing** customer in the Baton Rouge port from the defendants over an extended period of time, then it was felt that this was valid rebuttal to the defenses contention that reciprocity had no bearing on their phenomenal success. Even more pertinent would be the explanation given to Mr. Nelson by these customers for the refusal to even consider a change to his business.

This Court recently considered this very evidenciary question in the case of *Commissioner v. Consolidated Foods Corporation*, 85 S. Ct. 1220 (1965). In this case the court was dealing with the Clayton Act and specifically held that evidence after acquisition and, thus after the fact, was admissible in considering the existence of the continuing effect of reciprocity as an anti-trust practice. The view was that such

evidence even though being after the fact of acquisition was excellent in determining the question as to whether or not competition was stifled by reciprocity forces. This Court gave specific recognition that such a consideration is continuing in nature and therefore relevant so long as reciprocity was the element considered.

The point raised by this reason for writ is whether or not reciprocity under the Sherman Act, just as under the Clayton Act, can be validly considered on evidence that took place after the plaintiff's bankruptcy, in determining if continuing reciprocity forces are still stifling the market in which the plaintiff, though now departed, once existed. If plaintiff had successfully shown as it did in the disputed offer of proof that Mr. Nelson could do no better than the plaintiff had, even though located in the plaintiff's exact location and with considerably better financial structure, and even better equipment and that he was unable to even obtain **one** new grain towing customer during the period of time since he had entered the business up to the date of trial, a period of over a year, we feel that such a consideration under such circumstances falls within the meaning, the reasoning and the rule set out in the *Commissioner v. Consolidated Corporation* case as being a valid and highly effective way of refuting the claim of a free market made by the defense.

4. Did the Court of Appeals substantially err in accepting the conclusion of the lower court that Cargo Carriers, Inc., obtained a complete dominance of the fleeting and harbor towing business in the Baton Rouge Port as to grain barges because of superior service and management on the part of the said Cargo Carriers, Inc.

It is our position that where a company such as the defendant CCI enters an otherwise highly competitive field and immediately obtains control of all of the business from customers who are actually their competitors in the towing business, then such a success cannot be viewed as anything but unnatural. When it is further seen that these competitors are subjected to a priority system of service which of necessity favors CCI and Cargill over their own equipment and at prices considerably greater than previously charged then no amount of explanation can be given which could cover a clear violation of the Sherman Act where the power of reciprocity over these same customers is admittedly present.

It is our understanding that this court is loath to grant writs on questions that are not of general concern. This particular reason for writ is therefore added without extensive explanation in order to assure its consideration if a writ if granted for the reasons otherwise shown that do have general and universal importance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated at Baton Rouge, Louisiana, December 3, 1965.

Respectfully submitted,

BENTON & MOSELEY
114 St. Louis Street
Baton Rouge, Louisiana

DODD, HIRSCH, BARKER, AVANT & WALL
429 Government Street
Baton Rouge, Louisiana

Attorneys for Petitioner

APPENDIX A

Judgment Below

CLARK MARINE CORPORATION

v.

CARGILL, INC., CARGO CARRIERS, INC., LLOYD GRAVING AND TOM BETTS

Civ. A. No. 2618

United States District Court

E. D. Louisiana,

Baton Rouge Division

Feb. 10, 1964

WEST, District Judge.

This is an action seeking a permanent injunction, together with treble damages for alleged violation of the Federal antitrust laws, 15 U.S.C.A. § 1 et seq. Petitioner, Clark Marine Corporation, hereinafter referred to as "Clark," originally alleged that respondents, Cargill, Inc., hereinafter referred to as "Cargill," Cargo Carriers, Inc., hereinafter referred to as "Cargo," Lloyd Graving, and Tom Betts, conspired to monopolize all of the docking, fleeting, switching, and repair services in the Port of Baton Rouge. During the trial, however, it was stipulated that the monopoly alleged pertained only to the fleeting and switching of grain barges.

Clark is a Louisiana corporation, organized in July, 1960, and at all times pertinent to this suit, engaged in fleeting, switching, boat cleaning, and boat repair business in the Port of Baton Rouge Rouge. Cargill is primarily a grain company,

with headquarters in Minneapolis, Minnesota, which does business on an international scale. It operates the only grain elevator in the Port of Baton Rouge under lease agreement with the Greater Baton Rouge Port Commission. Cargo is primarily a water transportation company, and is a wholly-owned subsidiary of Cargill. Cargo's primary function is to provide, either by use of its own barges and equipment, or by contract with other carriers, for the transportation of Cargill's commodities. Lloyd Graving is the manager of Cargill's Baton Rouge operation, and Tom Betts is the manager of Cargo's Baton Rouge operation.

The Court having split the issues involved in this case for the purposes of trial, this cause came on for trial, without a jury, on November 4, 5, 6, 7, and 12, 1963, on the issue of liability only, i. e., for a determination of the question of whether or not respondents are liable to petitioner under the provisions of the Federal antitrust laws, 15 U.S.C.A. § 1 et seq. If liability were found to be present, the question of quantum was to be resolved by a subsequent trial limited to that issue.

After hearing five days of evidence, and after carefully considering all of the documentary evidence, as well as the briefs and arguments of counsel, this Court concludes that petitioner has failed to carry the burden of proving that respondents in any way conspired to monopolize, or that they did in fact monopolize any of the fleeting and switching business in the Port of Baton Rouge, Louisiana, in violation of the Federal antitrust laws. In accordance with this conclusion, the Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Cargill has, since 1955, operated a grain elevator at Port Allen, Louisiana, which is located in the heart of the Baton Rouge Port. This elevator accepts grain for storage from many sources throughout the country, and is operated in competition with fourteen other large elevators in the Lower Mississippi Gulf area. Cargill's elevator, like those of its competitors, is primarily an export elevator. They store grain, which comes from grain surplus areas in the United States. They receive export orders calling for specific grades and types of grain, and in accordance with these orders, grain of the various grades are mixed and blended to meet the requirements of the contract. After mixing and blending, the grain is transferred from the elevator into ocean-going vessels for shipment overseas or to points of destination as called for by the contracts. Approximately 35 per cent of the grain received by Cargill moves to the Cargill elevator by railroad car, and approximately 65 per cent of the grain received moves into the port area and to the elevator by river barge. Of the 65 per cent of the grain moving into the Baton Rouge Port by barge, approximately 40 per cent is carried by barges owned or managed by Cargo, a wholly-owned subsidiary of Cargill. The balance of the grain coming into the port area by barge is carried on barges owned and operated by other barge lines. These barges, which are moved up and down the Mississippi River, are made up into "tows" of several barges made up together, and are pushed up and down the river by line tow boats. In 1955, when Cargo commenced operating in the Baton Rouge Port, a tow consisted of very few barges, seldom more than three. However, as the size of line tow boats increased, the size of the tows increased, so that by 1959 a tow would normally consist of twelve to fifteen barges. In 1959

the so-called super line towboat made its appearance on the River, and these boats, being large and powerful, were capable of pushing tows consisting of thirty or more barges. As these large tows reached the port area, it is obvious that they could not be simultaneously unloaded into the elevator. Consequently, it was necessary to "park" these barges while awaiting their turn for unloading. Consequently, an area convenient to the elevator had to be provided for a sort of parking place for these barges. This area is referred to as a "fleet," and because of the fact that these large towboats were rather unwieldy, they were not suitable for "switching" or moving the barges out of their tow and into the fleet. Consequently smaller harbor towboats are used to "switch" the barges from the tow to the fleet, and later from the fleet to another tow for return to its point of departure or elsewhere. Ordinarily the owner or operator of the "fleet" charges a certain rate per day to the owner of the barge for each day that the barge remains in the "fleet," and the owner of the switching boat charges either a per hour fee or a per switch fee for switching a barge in or out of the fleet. Also, it is not always practical to unload the barges in the order in which they arrive at the port because of the fact that it is necessary for the elevator to mix and blend different kinds of grain in order to fill certain orders, and consequently, they must take the grain from the barge which is carrying the particular type of grain needed for the mixing and blending them in process.

2. At the time Cargill commenced business in the Port of Baton Rouge, its elevator had a capacity of approximately 2.5 million bushels of grain. In 1959 the capacity of the elevator was increased to 7.7 million bushels, and in the past year, approximately 115 million bushels of grain passed through the Cargill elevator.

3. The Port of Baton Rouge receives from 7,000 to 8,000 inbound barges per year, of which number from 60 to 70 per cent are grain barges bound for the Cargill elevator. The remaining barges carry commodities such as gasoline, fuel oil, petroleum, sodium hydroxide, and other industrial chemicals, as well as iron ore, scrap iron, aluminum ores, etc. This suit in no way involves the switching or fleeting of any barges other than grain barges destined for the Cargill elevator. Petitioner is not now contending that defendants have in any way conspired to monopolize or have in fact monopolized the switching or fleeting of any barges other than grain barges as the testimony shows conclusively that respondents have not handled anything other than grain barges in the Port of Baton Rouge.

4. At the time of Cargill's entry into the Port of Baton Rouge in 1955, the fleeting and switching services in the port were performed almost exclusively by two companies, Kenneth A. Hutton, and Louisiana Marine Services. (Louisiana Marine Services is apparently a subsidiary of Baton Rouge Coal and Towing Company, and sometimes the names of these two companies are used interchangeably.) Baton Rouge Coal and Towing Company and/or Louisiana Marine Services handled most of the fleeting and switching of petro-chemical barges and barges carrying commodities other than grain. Kenneth A. Hutton maintained a fleeting area on the west bank of the River (the same side on which the Cargill elevator is located) about one and a half miles up river from the elevator. Louisiana Marine's fleeting area was located on the east bank of the River approximately across the River from the Hutton fleeting area. Between 1955 and 1958, practically all of the fleeting and switching in the Port of Baton Rouge,

including the fleeting and switching for Cargill, was done by these two companies.

5. Approximately 60 per cent of the grain transported to the elevator by barge was carried on barges owned by various barge lines, such as Mississippi Valley Barge Line, Federal Barge Line, Upper Mississippi Towing Company, Union Barge Line, American Barge Line, Sioux City Barge Line, etc. The fleeting and switching for all of these carriers, between 1955 and 1958, as well as the fleeting and switching required by Cargo, was done by either Hutton or Louisiana Marine Services.

6. Delays in the handling of barges in the port are extremely expensive both to the barge line involved and to Cargill. For instance, when the elevator is closed down because of the unavailability of barges, the cost of Cargill of shutting down the elevator is approximately $500 per hour. Also, where barges are forced to remain in stream, there is a demurrage charge to Cargill for failure to unload the barges promptly. Consequently, if there are 60 barges waiting in the river to be unloaded, and the elevator is shut down for four hours, there results 240 hours, or 10 full days of demurrage chargeable to Cargill, together with a shutdown cost of approximately $2,000. Thus, the necessity for expeditious handling of the barges becomes apparent.

7. During the period 1955 through 1958, there were many complaints emanating from Cargill and from the other carriers involved concerning the caliber of the fleeting and switching services performed by the two available companies in the Baton Rouge Port area. When repeated complaints failed to improve the service, the management of Cargill at Baton Rouge suggested to its home office in Minneapolis that

their subsidiary, Cargo, be established in the fleeting and switching business in the Port of Baton Rouge. The home office management of Cargill was reluctant to have Cargo enter into fleeting and switching business in Baton Rouge, and suggested that the Greater Baton Rouge Port Commission be contacted and requested to establish a suitable fleeting and switching service in the port. This was done, but the Greater Baton Rouge Port Commission refused to engage in the fleeting and switching business in the Baton Rouge Port. Thereafter, in order to obtain for its own operations what Cargill believed would be fleeting and switching services superior to those available in the Port of Baton Rouge, it arranged for its wholly-owned subsidiary, Cargo Carriers, to engage in furnishing those services in the Port of Baton Rouge. A survey of the business of the Baton Rouge Port was conducted by Cargo officials and by Cargill, and it was their conclusion that such an operation on the part of Cargo could not be profitable if limited to the switching and fleeting only of Cargo owned or managed barges. It was, however, the considered opinion of the officials of Cargo that they could reasonably expect to attract some of the fleeting and switching business of the other barge lines transporting grain into the Baton Rouge area, and that if this prediction was correct, their operation could be profitable. Consequently, as the result of this survey, Cargo Carriers entered into the fleeting and switching business in the Port of Baton Rouge on April 1, 1959. At that time, Kenneth Hutton and Louisiana Marine Services were both in the fleeting and switching business in the harbor. Also, a Captain Joe Hightower and a Captain Bert Kleinpeter each had a small boat that was suitable for switching and was available, when needed, to perform harbor work.

8. Cargo Carriers was an efficiently organized and apparently excellently managed company which was able to provide fleeting and switching services of a superior quality to those supplied by Hutton and Louisiana Marine Services insofar as the fleeting and switching of grain barges was concerned. As a result of this efficient operation, several of the barge lines who had been previously giving their fleeting and switching business to either Hutton or Louisiana Marine Services switched over and gave their business to Cargo.

9. In the six month period immediately prior to April, 1959, when Cargill entered the fleeting and switching business in Baton Rouge, 492 grain barges were unloaded at the elevator, and the elevator had been forced to shut down a total of 67 hours. During the six month period immediately following the entry of Cargill into the fleeting and switching business in the Port of Baton Rouge, the elevator unloaded over 750 barges, but was forced to be idle only 35 hours. These facts clearly indicate that the services rendered to the elevator and to the barge lines by Cargo were vastly superior to those which had been previously furnished by the other available companies in the fleeting and switching business.

As a result of the obviously superior service rendered by Cargo in the port area, Kenneth Hutton lost substantial business from the various barge lines, and ultimately went out of business. Louisiana Marine Services also lost substantial business, but it, or Baton Rouge Coal and Towing Company, retained, and still retains, most of the fleeting and switching of petro-chemical barges and other barges not connected with the transportation of grain. Thus, purely and simply because of the ability of Cargo to render a more efficient and more dependable service, a large percentage of the fleet-

ing and switching of grain barges after April 1, 1959, was done by Cargo Carriers, Inc.

10. Petitioner, Clark Marine Corporation, is a corporation incorporated under the laws of Louisiana on July 14, 1960, with an initial paid in capital of approximately $200,000. At the time of its incorporation, it was intended that the corporation would develop dry dock facilities and engage in the business of repairing boats, and that it would also engage in the business of steam cleaning and gas freeing petrochemical barges by use of a mobile steam cleaning plant to be purchased and mounted on a barge. In furtherance of these plans, petitioner purchased approximately 32 acres of land in an area north of the Mississippi River Bridge at Baton Rouge, Louisiana, known as Devil's Swamp, which area is located approximately 7 miles from the center of the Baton Rouge harbor area. This area is in a "dead water" location, and hence, was a suitable area for the conducting of a ship repair and steam cleaning business. The property was purchased by petitioner for the sum of approximately $64,000, and an additional $34,000 was spent filling, grading, and improving the property. Thereafter, the mobile steam cleaning plant was purchased for approximately $181,000.

11. The dry dock facilities were never constructed by petitioner, and apparently, in the early part of 1961, petitioner abandoned the idea of providing dry dock services. Dry dock services were available from a company known as Dravo Corporation, which corporation, at the time, was apparently considering the possibility of also providing steam cleaning and gas freeing services in the Port of Baton Rouge. By agreement between petitioner and Dravo, Clark agreed to abandon its plans for developing a dry dock service in exchange

for Dravo agreeing to abandon its plans to provide steam cleaning and gas freeing services in the port. As was stated by Captain Clark, President of Clark Marine, "As both of these items are expensive and are used together to provide ship services, the effect of this understanding was to reduce the investment by both firms, and still, in a manner of speaking, split the business available in the area on somewhat the same basis that would have occurred had we been in full competition."

Thus, after this decision was made, the primary business, and in fact, the only business of Clark, was that of steam cleaning and gas freeing petro-chemical barges.

12. The Devil's Swamp area where Clark was located, being approximately 7 miles from the location of the Cargill elevator, was obviously not a suitable area for fleeting and switching grain barges from the elevator. The cost of moving the barges to and from such a fleeting area would place Clark at a serious economic disadvantage when compared with other fleeting and switching services located in close proximity to the Cargill elevator. Even though Clark attempted to show, during the trial of this case, that they did intend to engage in the fleeting and switching business while still located at Devil's Swamp, nevertheless the evidence is overwhelming to the contrary. It is obvious that Clark's intention was to acquire a suitable location for fleeting if they found it feasible to attempt to engage in the fleeting and switching business. To try to determine the feasibility of this, they put out "feelers" by way of advertisements in the Waterways Journal in February and March of 1961. Whenever they contacted potential customers, though, they were

careful to point out that they expected to have a suitable fleeting area available in the center of the port area.

13. During the first year of Clark's operation, while located in the Devil's Swamp area, the corporation lost approximately $91,000. This loss was in addition to an expenditure of approximately $42,000 in pre-operational expenses, making a total loss from the date of its incorporation on July 14, 1960 through June 30, 1961, of approximately $133,000. Thus, Clark Marine, with an initial paid in capital of only $200,000, was in very precarious financial condition at the end of its first year of operation. The financial reports of this corporation show beyond any question of doubt that its administrative overhead expenses were out of all proportion to its needs, and that these expenses, during the first year of operation, actually exceeded the total gross income of the corporation.

14. It was apparently at this time that the management of Clark decided to actually try to get into the fleeting and switching business in the Baton Rouge Port. As previously shown, by this time, Cargo had been in the fleeting and switching business some two years, and was actually servicing practically all of the grain barges destined for the Cargill elevator. Clark, realizing that their location was not suitable for the fleeting and switching business, acquired, by lease, a location known as Red Dog Landing, which was located on east side of the River, across from the Cargill elevator. When Clark moved its operation from Devil's Swamp at Red Dog Landing, it resulted in the abandonment of its $98,000 investment in the Devil's Swamp location. In view of its extremely precarious financial situation at that time, the corporation could ill afford such an abandonment and ultimate loss. Clark

actually transferred its operations to the Red Dog Landing location on September 6, 1961. This was the first date on which it was in a position to offer fleeting and switching services at a convenient location for the grain barges destined for the Cargill elevator.

15. After relocating at Red Dog Landing, Clark actively solicited fleeting and switching business from the various barge lines, and shortly after it commenced its operation at Red Dog Landing, Mississippi Valley Barge Line, one of the largest barge lines operating on the River, American Commercial Barge Line, another one of the largest barge lines operating on the River, Union Barge Line, and John I. Hay Barge Line, all transferred their fleeting and switching business to Clark Marine. This business remained with Clark Marine until it went into bankruptcy and ceased to do business. Up until this time, Baton Rouge Coal and Towing Company was fleeting most of the petro-chemical barges in the port, and Cargo was fleeting practically all of the grain barges in the port. Rather than compete with Cargo for the grain barges, Baton Rouge Coal and Towing Company voluntarily elected, from time to time, to charter or lease one or more of their boats to Cargo when additional help was needed by Cargo, at peak times, for the switching and fleeting of grain barges.

16. Despite the fact that Clark did, in fact, obtain some of this fleeting and switching business, it was, nevertheless, an unprofitable operation from its very commencement. As a matter of fact, the evidence showed that if Clark had been given all of the fleeting and switching of grain barges in the harbor, it still would have lost money. Clark Marine was simply under-capitalized, poorly-operated and over-expensed.

17. After experiencing these heavy losses in the pursuit of their regular business, Clark Marine then attempted to go into the boat building business. Three boat building projects were then undertaken, and all three projects had to be abandoned after Clark suffered heavy losses before the jobs were anywhere near completion. On one of the hulls alone, which had a contract price of $52,500, costs of $83,798 were incurred by Clark prior to the abandonment of the job. Even on some of its cleaning and degassing projects, the costs were poorly estimated. On one particular job, in Mobile, which was supposed to have produced a handsome profit, the company ended up suffering a very severe loss instead.

18. The evidence in this case clearly shows that the fleeting and switching business in the Port of Baton Rouge was not sufficient to maintain two or more companies engaged in that business. If two or more companies were engaged in that business, it would be necessary for them to have other business activities, of a profitable nature, in order to survive. Clark Marine was not successful in any phase of its business activities.

19. On May 25, 1962, the same day that the present suit was filed, Clark Marine filed a Petition for Re-Organization Under Chapter X of the Bankruptcy Laws. This re-organization attempt was unsuccessful, and Clark Marine was, shortly thereafter, adjudged a bankrupt. Clark Marine now attempts to place all of the blame for their business failure on the respondents, contending that the respondents conspired to, and did in fact, monopolize the business of fleeting and switching grain barges in the Port of Baton Rouge to such an extent that it forced Clark Marine Corporation into bankruptcy. It is contended in their suit, and an attempt was made during the

trial to prove, that these respondents obtained the business of fleeting and switching grain barges for Cargo by coercing and threatening the large barge lines doing business in the Baton Rouge Port. Clark contends that because of the fact that Cargill is in a position to contract out the shipping of grain from its elevator, that it was in a position to, and actually did, threaten the large barge lines with loss of business if they, in turn, did not allow Cargo to do its fleeting and switching in the Port of Baton Rouge.

20. These contentions by petitioner were in no way proved. There was no evidence of any kind introduced during the trial of this case which could even indicate that either Cargo or Cargill or the other two respondents in any way threatened or coerced barge lines into using the services of Cargo Carriers. On the contrary, the evidence was quite explicit, and proved without any doubt, that the transfer of business by most of these barge lines from Hutton, Baton Rouge Coal and Towing, and Louisiana Marine Service, was brought about by a widespread dissatisfaction with the service being rendered by those companies. Representatives of these barge lines testified that they expected better service from Cargo; that they got better service from Cargo and that they were pleased with their choice. This Court therefore finds as a fact that there was absolutely no proof of threats, intimidation or coercion of any kind used by the respondents, or any of them, to either obtain or to maintain the business which they had at the time Clark Marine attempted to enter into the fleeting and switching business in the Port of Baton Rouge, nor was there any proof of any threats or coercion, or of any conspiracy to threaten or coerce anyone on the part of these respondents following the attempted entry of Clark Marine into the fleeting and switching business.

21. It is found by the Court, as a fact, that petitioner, Clark Marine, was in no way damaged by any illegal activities on the part of respondents while operating and doing business in the Port of Baton Rouge. It is further found as a fact that the demise of Clark Marine as a business entity in the Port of Baton Rouge was brought about solely and entirely by its own under-capitalization and poor management rather than by any illegal acts on the part of these respondents.

22. It is found as a fact, from the evidence adduced in this case, that even though Cargo Carriers did acquire practically all of the fleeting and switching business in the Port of Baton Rouge insofar as grain barges are concerned, this business was aquired by them through good, sound, and legal business practices, rather than by any illegal acts on their part. Approximately 40 per cent of the grain barges which they fleet and switch are barges which they own and operate themselves. Even petitioner does not contend Cargo does not have a right to fleet and switch their own barges. The remainder of the grain barges which they handle in the Port of Baton Rouge, while making up the remainder of the total grain barge fleet, does not in any way involve the other cargo and petro-chemical barges fleeted and switched by others in the Port of Baton Rouge. The fact that American Commercial Barge Lines, Mississippi Valley Barge Line, Union Barge Line, and John L. Hay Barge Line, constituting some of the largest barge lines operating on the River, switched their business from Cargo to Clark Marine, and that as a result thereof, their business relations with Cargo in no way deteriorated, very clearly indicates that these barge lines were free to place their business where they felt their interests could best be protected and promoted. The evidence clearly shows by testimony from officials of all of the various barge lines, that they were

completely and totally free to place their business where they saw fit, and that they felt under no compulsion of any kind to place their business with any particular fleeting or switching service.

23. When Clark Marine realized that they were not able to attract more of the fleeting and switching business, they apparently realized that there was not enough of this business to sustain two or three companies in the Port. Consequently, Clark Marine officials approached the Greater Baton Rouge Port Commission, challenging the right of Cargo or Cargill to engage in fleeting operations of any kind in the Port of Baton Rouge. On what grounds such a challenge was made is not clearly apparent from the evidence, but in any event, the evidence is clear to the effect that Clark Marine did approach the Greater Baton Rouge Port Commission, not for the purpose of trying to get a portion or fair share of this business, but for the express purpose of attempting to get the Port Commission to declare that Cargo must get out of the fleeting and switching business completely in the Port of Baton Rouge. The Port Commission refused to accede to these demands of Clark. Thus, Clark, on its own behalf, attempted to bring about a situation which would force all of the barge lines to bring their business to Clark, as the only remaining switching and fleeting operator in the Port. This attempt failed, and when the business remained "up for grabs," in free competition, Clark Marine was simply not able to survive.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter, and venue is properly laid in the Eastern District of Louisiana,

Baton Rouge Division, pursuant to the provisions of Title 15, U.S.C.A. § 1 et seq.

[1] 2. The provisions of the antitrust laws applicable to this case, and the ones which petitioner alleges have been violated by respondents, are as follows:

> Title 15, U.S.C.A. §1:
>
> "Every * * * conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."
>
> Title 15, U.S.C.A. § 2:
>
> "Every person who shall monopolize, or * * * conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."
>
> Title 15, U.S.C.A. § 15:
>
> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *."

Thus, it is necessary, in this case, for petitioners to prove, by a preponderance of the evidence, that the named respondents conspired to monopolize, or that they did in fact unlawfully monopolize a part of the trade or commerce here involved in the Port of Baton Rouge, and that as a result of such monopoly or conspiracy to monopolize, petitioner has been injured in his business and/or property.

[2] 3. A plaintiff, in a triple damage action such as this, carries a heavy burden of proof, and the trier of facts must be solidly convinced that petitioner has proved its case by a

preponderance of the evidence. *Paramount Film Distributing Corp. v. Applebaum*, 217 F.2d 101 (CA5 1954), cert. den. 349 U.S. 961, 75 S. Ct. 892, 99 L. Ed. 1284.

[3] 4. Mere size of a company, without evidence of predatory practices aimed at competitors, is not unlawful. Under our free enterprise system, where competition is encouraged, the successful competitor must not be punished when he wins just as long as his business activities and his methods and means of competition have been lawful and not afoul of the antitrust laws. *United States v. Aluminum Company of America*, 148 F.2d 416 (CA2 1945). As was stated in G. & P. Amusement Co. v. Regent Theatre Company, 107 F.Supp. 453, 459, (ND Ohio 1952), aff'd 216 F.2d 749 (6th Cir. 1954), cert. den. 349 U.S. 904, 75 S. Ct. 579, 99 L. Ed. 1240:

> "There is nothing inherently unlawful in the acquisition and retention of a great volume of purchasing power. It is only when that power is used in such a manner as to further an unlawful restraint of trade that the wielder of the power runs afoul of the Sherman Act."

[4] 5. It is, of course, necessary to look at the manner in which a position of monopoly, if one exists, has been obtained. A position of monopoly, in itself, is not necessarily prohibited by the Sherman Anti-trust Act. As was stated in United States v. E. I. DuPont de Nemours & Co., 118 F.Supp. 41, 214-215, (D.Del. 1953), aff'd 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956):

> "The decisions stated a defendant may lawfully obtain a monopoly position if that position is 'thrust upon it.' Thus the right to normal growth and to enjoy the results of technical achievement and successful competition has been preserved. * * * The decisions, on the contrary, demonstrate, if the challenged position is acquired, as it

> has been in this case, by superior technical skill and effective competitive activity, the resulting power from that position does not establish monopolization within the meaning of the statute. * * * Even dissenting judges in this case recognize when 'size and power have been obtained by lawful means and developed by natural growth' a corporation having even 'a dominating place' is 'entitled to maintain its size and the power that legitimately goes with it, provided no law has been transgressed in obtaining it. * * * ' "

[5] 6. This Court concludes, as a matter of law, that the evidence adduced at the trial of this case clearly establishes that whatever superior position the respondents herein enjoy in the fleeting and switching business in the Port of Baton Rouge was acquired entirely by lawful means and by their application of superior technical skill and effective competitive activity, and that there is no showing of any kind in this case that respondents, or any of them, employed the use of coercion, threats, or other unlawful means to acquire or maintain the business which they currently enjoy. Petitioner has likewise failed to prove any conspiracy on the part of these respondents.

7. This Court further concludes, as a matter of law, that from the evidence presented during the trial of this case, the business failure experienced by petitioner, Clark Marine, resulted from its own under-capitalization, poor management, and ineptness in the business in which it was engaged, and that petitioner was in no way injured or damaged by any illegal activities on the part of these respondents.

8. In accordance with the findings and conclusions herein set forth, the demands of petitioner must be denied and this suit dismissed at petitioner's cost. Judgment to be entered accordingly.

APPENDIX B

Opinion Below

CLARK MARINE CORPORATION,
Appellant,

v.

CARGILL INC., et al., Appellees.

No. 21729.

United States Court of Appeals
Fifth Circuit.
May 7, 1965.

PER CURIAM:

The facts from which this appeal arose and the basis for the district court's decision are fully developed in its opinion. Clark Marine Corporation v. Cargill, Inc., 226 F.Supp. 103. After notice of appeal was filed, the deposition of a witness was taken. A motion to quash the deposition was denied with a reservation referring to the panel hearing the case on the merits the question as to what effect, if any, should be given to the deposition. We conclude that the deposition should not be considered, but we are also of the opinion that a consideration of it would not in any way affect the disposition of the appeal. We find ourselves in agreement with the district court and its judgment is

Affirmed.

APPENDIX C

Order Denying Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21,729

CLARK MARINE CORPORATION,

Appellant,

v.

CARGILL, INC., ET AL,

Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING (SEPTEMBER 14, 1965)

Before JONES, WISDOM, Circuit Judges, and BREWSTER, District Judge.

BY THE COURT:

IT IS ORDERED that the petition for rehearing in the above entitled cause be, and the same is hereby denied.

APPENDIX D

Statutes Involved

Relevant Sections of the Sherman Anti-trust Act as contained in Title 15 of the United States Code.

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title should render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territoy, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between factors, or between retailers, or between persons,

firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 180. c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 State. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 12. Words defined

"Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' " approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District

of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. Oct. 15, 1914, c. 323, § 1, 38 Stat. 730.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

CERTIFICATE OF SERVICE

I certify that service of a copy of the above and foregoing petition for a writ of certiorari has been made upon Laurance W. Brooks and Charles W. Phillips at Taylor, Porter, Brooks, Fuller & Phillips, Louisiana National Bank Bldg., Baton Rouge, Louisiana, and Robert L. Stern, Erwin C. Heininger, and Thomas B. McNeill at Mayer, Friedlich, Spiess, Tierney, Brown & Platt, 231 South LaSalle Street, Chicago, Illinois, by depositing the same in the United States Mail, with first class postage, prepaid, properly addressed to the respective addresses.

Baton Rouge, Louisiana, _____, 1965

_____

By: Edward Donald Moseley

_____

BENTON & MOSELEY
114 St. Louis Street
Baton Rouge, Louisiana

_____

DODD, HIRSCH, BARKER, AVANT & WALL
429 Government Street
Baton Rouge, Louisiana

Attorneys for Petitioner

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 7 1966
JOHN F. DAVIS, CLERK

No. 806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

CLARK MARINE CORPORATION,

Petitioner,

vs.

CARGILL, INC., CARGO CARRIERS, INC., LLOYD GRAVING AND TOM BETTS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

ROBERT L. STERN
ERWIN C. HEININGER
231 South LaSalle Street
Chicago, Illinois

LAURANCE W. BROOKS
Louisiana National Bank Bldg.
Baton Rouge, Louisiana
Attorneys for Respondents

McCORMICK & HENDERSON, INC., CHICAGO

TABLE OF CONTENTS

	PAGE
Opinion Below	2
Statement of Facts	2
Argument	11
A. The courts below did not apply a different criterion to petitioner because it was bankrupt, or improperly consider the evidence as to the reasons for petitioner's losses	11
B. The evidence shows that the barge lines were not induced to and did not patronize CCI's Baton Rouge fleet because CCI was also a customer for barges	15
C. The lower court did not err in excluding, on the basis of an objection initiated by petitioner, some evidence as to statements made to the person who took over petitioner's fleet after petitioner's bankruptcy	23
Conclusion	25

TABLE OF CASES

PAGE

American Football League v. National Football League, 323 F.2d 124, 131 (C.A. 4, 1963) 16

Association of Western Railways v. Riss & Co., 299 F.2d 133, 135 (C.A.D.C., 1962), cert. den. 370 U.S. 916 12

Buckeye Powder Co. v. Du Pont Powder Co., 223 Fed. 881 (C.C.A. 3, 1915), affirmed 248 U.S. 55 (1918) 13, 14

California Packing Corp., 25 F.T.C. 379 (1937) 19

Federal Trade Commission v. Consolidated Foods Corp., 380 U.S. 592 (1965) 21, 22

Flintkote Company v. Lysfjord, 246 F.2d 368, 392 (C.A. 9, 1957), cert. den. 355 U.S. 835 13

Hudson Sales Corp. v. Waldrip, 211 F.2d 268, 274 (C.A. 5, 1954) 12, 13

International Business Machines Corp. v. United States, 298 U.S. 131 (1936) 20

John Wright & Associates v. Ullrich, 328 F.2d 474 (C.A. 8, 1964) 16

Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 162-63 (1922) 13

Mechanical Manufacturing Co., 16 F.T.C. 67 (1932) 19

Scott Publishing Co. v. Columbia Basin Publishers, 293 F.2d 15 (C.A. 9, 1961) 16

Story Parchment Paper Co. v. Paterson Co., 282 U.S. 555, 562 (1931) 13

PAGE

Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582, 584 (C.A. 1, 1960), cert. den. 365 U.S. 833 16

United Exhibitors v. Twentieth Century Fox Film Distributing Corp., 31 F.Supp. 316 (W.D. Pa., 1940) ..14, 15

United States v. Aluminum Company, 148 F.2d 416, 430 (C.A. 2, 1945) 16

United States v. du Pont & Co., 118 F.Supp. 41, 215 (D. Del., 1953), aff'd on other grounds 351 U.S. 377 (1956) 16

United States v. Griffith, 334 U.S. 100 (1948) 20, 21

United States v. Harte-Hanks Newspapers, Inc., 170 F.Supp. 227, 229 (N.D. Tex., 1959) 16

United States v. Paramount Pictures, 334 U.S. 131, 171 (1948) 16

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 230 (1940) 24

Waugh Equipment Co., 15 F.T.C. 232 (1931) 19

STATUTES

Sherman Act, §§ 1, 2 and 4, 15 U.S.C. §§ 1, 2 and 15 .... 1, 12

MISCELLANEOUS

21 Cong. Rec. 3152 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 806

CLARK MARINE CORPORATION,

Petitioner,

vs.

CARGILL, INC., CARGO CARRIERS, INC., LLOYD GRAVING AND TOM BETTS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

This is a suit for treble damages for alleged violation of Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act (15 U.S.C. §§ 1, 2 and 15). After trial, the District Court found that the antitrust laws had not been violated. The trial court's opinion was adopted by the United States Court of Appeals for the Fifth Circuit, which affirmed *per curiam*.

OPINION BELOW

The *per curiam* opinion of the Court of Appeals for the Fifth Circuit (App. B of Petition) is not reported at 345 F.2d 103 (Pet. p. 2), but at 345 F.2d 79.

STATEMENT OF FACTS.

The Statement in the petition, once it gets beyond a general description of the industry, is incomplete and, as to significant matters, incorrect. The District Court's Findings of Fact (Pet. App. 41-54) fairly state the facts. In the interest of brevity, this Statement summarizes without repeating those Findings, amplifying them only when necessary to meet petitioner's contentions.

Defendant Cargill, a large exporter of grain, has since 1955 leased the only grain elevator in the Port of Baton Rouge from the Baton Rouge Port Commission. Defendant Cargo Carriers, Inc. (hereinafter CCI) is a transportation subsidiary of Cargill; it operates a barge line and is charged with the responsibility of providing itself or obtaining from other companies sufficient barges to transport Cargill grain down the Mississippi River system. Cargill shipments accounted for less than 2% of the total tonnage transported on the Misissippi River system during the period here involved. (Def. Ex. 19.)

Grain barges arriving at Baton Rouge are taken out of the river tows and parked in what is called a "fleet" prior to unloading at the elevator. Harbor tow boats smaller than the river tow boats switch the barges from the tow to the fleet area, between the fleet and the elevator, and then back to an up-river tow. These harbor services must be performed efficiently because, as the court found, de-

lays are costly to the various barge owners as well as to Cargill in the operation of the elevator. (Fdg. 6, Pet. App. 44; R. 542-43, 253, 155.)

By 1959, when the elevator's capacity was greatly increased, there was widespread dissatisfaction among the barge lines as to the quality of service provided by the principal existing fleeting and switching operators, Hutton and Louisiana Marine. Some moorings were not proper; barges broke away, became grounded and even sank; there were frequent and excessive delays; and direct radio contact between towboats and fleeters' offices was lacking (R. 548-49, 606-07, 615-16, 664-66, 817-19, 1056-57, 1060-61.) Witnesses from other barge lines, as well as from CCI, characterized their services as "not reliable" (R. 665-66), "very unsatisfactory" (R. 1060), and, indeed, "absolutely miserable." (R. 547.)

After repeated complaints proved unavailing, and after Cargill had unsuccessfully sought to induce the Greater Baton Rouge Port Commission itself to establish an improved fleeting and switching service, Cargill reluctantly authorized CCI to do so. CCI thereupon leased property suitable for a fleet just below the grain elevator site.

The District Court found that CCI's fleeting and switching services were "vastly superior to those which had been previously furnished by the other available companies." (Fdg. 9, Pet. App. 46.) Representatives of other barge lines "testified that they expected better service from Cargo, that they got better service from Cargo and that they were pleased by their choice." (Fdg. 20, Pet. App. 52.) Because of its "more efficient and more dependable service" CCI obtained practically all of the Baton Rouge grain barge fleeting and switching business. (Fdgs. 8, 9, Pet. App. 46.) These Findings, which seem

to be challenged in petitioner's fourth Question Presented, are supported by the testimony of many witnesses.[1]

Petitioner Clark Marine did not arrive upon the Baton Rouge scene with its harbor boat until about two years after CCI had opened its fleet. Its first location was at Devil's Swamp, seven miles upstream from the grain elevator in the main Baton Rouge Port area, but on a canal suitable for the dry dock, repair and cleaning activities which it first contemplated. In March 1961, it obtained a harbor towboat and attempted to enter the fleeting and switching business, apparently in the hope that industry would develop along the canal on which it was located. (R. 140-41.) But obviously Clark Marine could not compete for the fleeting or switching of *grain* barges at a location nearly seven miles further from the elevator than CCI's.[2]

Recognizing this, Clark Marine in September, 1961, moved to a new fleet at Red Dog Landing, across the river from CCI's fleet, and for the first time became competitive. It quickly obtained the business of four of the largest barge

---

[1] CCI's service was described by witnesses from other barge lines as "substantially better" (R. 667) and "much improved" (R. 823); Federal Barge Lines was "completely satisfied" (R. 1058). Service to and from the elevator was more prompt and dependable; this enabled the barge lines to turn their barges more rapidly and minimize the time when they were unprofitably idle. (Fdg. 9, Pet. App. 46.)

[2] One of petitioner's witnesses testified that the switching cost would be double that of a fleet near the elevator (R. 101), and Clark itself later proposed charging four times as much (Compare Def. Ex. 73, p. 4 with R. 396-97).

lines on the Mississippi. By January, February and March, 1962, petitioner's fleeting and switching revenues had reached 39%, 41%, and 45% of the combined gross fleeting and switching revenues in Baton Rouge of Clark Marine and CCI from barge lines other than CCI itself. (Computed from Def. Ex. 105.)

Clark nevertheless lost money on this operation, as well as in all its other activities; it was "under-capitalized, poorly-operated, and over-expensed." (Fdg. 16, Pet. App. 50.)[3] As a result on May 25, 1962, it filed a petition in bankruptcy and on the same day commenced this lawsuit. (Fdg. 19, Pet. App. 51.)

Petitioner tries to convert the above facts into an anti-trust violation by claiming that CCI had threatened not to book the barges of any barge line which did not use CCI's Baton Rouge fleeting service. This charge was com-

---

[3] Mr. Benton, a director, second president of and an attorney for petitioner, testified that Clark Marine had four employees or officers, besides Capt. Clark, who "were paid substantial salaries and all of them, I think, all of them had cars that the company furnished and they had expense accounts; they had boat crews, around the clock boat crews, when I was there and they also had one or two full-time cleaning men that were on salary. All of these men's salaries plus insurance and the amortization of their debts added up to something in excess of what their [Clark Marine's] sales were." (R. 789.)

Benton was aware of Clark Marine's poor financial condition before it began fleeting in the center of the harbor; he described it as "awful." (R. 795, 786, 806.) Benton wrote on Sept. 12, 1961 that Clark Marine's financial picture was "terrible". (Def. Ex. 68, p. 2.)

pletely disproved, as the trial court found. (Fdg. 20, Pet. App. 52.)[4]

Almost immediately after opening its fleet at Red Dog Landing, petitioner's lawyers charged defendants with threatening the barge lines. Cargill and CCI officials not only denied this and that Cargill had any such policy, but expressed a willingness so to inform the barge lines. They did so in a letter of October 18, 1961, which stated (R. 755; Def. Ex. 14):

> "While we value your business highly, we wish to state again that our fleeting service represents, as it always has in the past, an economic service and function entirely apart and separate from any other business activity and relationship we enjoy with you and that *your decision to fleet or not to fleet with us will not, as it has not in the past, be reflected in any way in the handling of any other business relationship with you.*"[5] (Italics supplied.)

---

[4] Twelve witnesses, including two called by petitioner and eight representatives of other barge lines, as well as Cargill and CCI officials, testified that there had been no threats or pressure by any officers or employees of Cargill or CCI to use the fleeting and switching services of CCI in Baton Rouge. There was no testimony to the contrary. The record shows that the petitioner had also complained to the Antitrust Division of the Department of Justice, which took no action. (R. 804-05.)

[5] The petition (p. 16) asserts that Cargill "refused to take part" in a meeting set up to assure the barge lines on this point. The record shows, however, that Cargill took the position that before any such meeting should be held, petitioner's attorney Benton should discuss the matter with its "top echelon" at Minneapolis, but Benton decided not to do this. (R. 566-67.) Thereupon, CCI sent to the barge lines the letter quoted in the text, which made its policy so clear that a meeting was unnecessary.

In view of its inability to prove that defendants used threats "of economic reprisals" against the barge lines, as charged in the complaint, petitioner contends that threats were unnecessary to force the barge lines to use the CCI fleet, since they were aware that CCI was a substantial actual or potential customer. This argument assumes that, because of CCI's position as a customer, the barge lines were unable to make a free choice with respect to competing harbor services when CCI was one of the competitors. That assumption is, of course, contradicted by Clark Marine's ability to attract a number of the largest barge lines as soon as it began to operate in a competitive location.[6] And the two large barge lines which gave fleeting patronage to Clark thereafter received substantially *more* of CCI's hauling business than they had in the past, both dollar-wise and percentage-wise. (Def. Ex. 18; Fdg. 22, Pet. App. 53.)

Petitioner's theory that the barge lines would inevitably favor a large customer for their barges is contradicted not only by the fact that many of them didn't but also by

---

[6] Petitioner intimates (p. 16) that this did not occur until after it had threatened defendants with antitrust action. But as early as August 22, 1961, two weeks before Clark opened its fleet at Red Dog Landing, and several weeks before its attorneys had charged defendants with violating the antitrust law, Clark Marine had:

> ". . . been told by Mississippi Valley Barge Line, the second largest carrier on the river system, that they intend to use these facilities for fleeting, harbor towing, and repair as soon as we are ready to offer the service. The largest carrier, American Commercial Barge Line, has told us that they were still considering the matter, but felt it would be decided in our favor." (Def. Ex. 64, p. 1.)

the economics of the industry. For there has been a shortage of grain barges "for a good many years." (R. 686-87.) During the grain harvest seasons, which begin when the river opens up in April and run through December, the barge companies "have more customers than we know what to do with." (R. 834.) The barge lines "don't have enough barges", and the shippers are crying for more. (R. 835.) As a result, the grain shippers are dependent upon the barge lines and the latter have the superior bargaining position, rather than the other way around.

The CCI officials who determined its policy and placed most of the orders for barges (Brandenborg and Kleitsch) testified that because of these facts they were not in a position to put pressure on any barge lines. Kleitsch stated (R. 688):

> ". . . I am in no position to [put pressure on the barge lines to use CCI's Baton Rouge fleet] . . . I am asking them for barges to haul grain. I would not want to diminish my chances of getting barges for grain by asking for an additional favor.'"

For CCI to have risked the good will of the barge lines, upon whom it depended to carry millions of dollars worth of grain down the river, in order to increase its profits from the operation of its small Baton Rouge fleet (totalling $16,867 from September, 1961, through May, 1962 (Def. Ex. 106)), would have been a case of the tail wagging the dog and of Cargill acting in complete disregard of its major interests.

The barge lines, of course, were also aware of these basic economic factors, and of the shippers' need for their serv-

---

[7] See also Brandenborg's testimony (R. 749-50) and that of petitioner's witness Kitch, a former CCI employee. (R. 987.)

ices. A barge line officer testified that his company gave petitioner its fleeting and switching business because it hoped to get "better service by stimulating competition" (R. 1062), but that:

> ". . . There has been no change in our business relationship with Cargill or Cargo Carriers, Inc. subsequent to this switch. We continued to haul large quantities of grain for Cargo Carriers. There was no pressure on Mississippi Valley to favor Cargo Carriers to continue to use the fleet of Cargo Carriers, Inc. at the risk of losing grain traffic."

Other barge line officials said that they continued to use the CCI fleet because they thought it superior or because they were satisfied with it and saw no reason to change. (*E.g.*, Def. Ex. 116, R. 1057-58, 667-71.)

These facts, which we have only briefly summarized, fully support Finding of Fact 22 (Pet. App. 53-54) which reads as follows:

> "It is found as a fact, from the evidence adduced in this case, that even though Cargo Carriers did acquire practically all of the fleeting and switching business in the Port of Baton Rouge insofar as grain barges are concerned, this business was acquired by them through good, sound, and legal business practices, rather than by any illegal acts on their part. * * * The fact that American Commercial Barge Line, Mississippi Valley Barge Line, Union Barge Line, and John I. Hay Barge Line, constituting some of the largest barge lines operating on the River, switched their business from Cargo to Clark Marine, and that as a result thereof, their business relations with Cargo in no way deteriorated, very clearly indicates that these barge lines were free to place their business where they felt their interests could best be protected and promoted. The evidence clearly shows, by testimony from officials of all of the various barge lines, that they were com-

pletely and totally free to place their business where they saw fit, and that they felt under no compulsion of any kind to place their business with any particular fleeting or switching service."

The District Court concluded (Pet. App. 56-57) that "A position of monopoly, in itself, is not necessarily prohibited by the Sherman Anti-trust Act" when acquired "by superior technical skill and effective competitive activity," and:

> ". . . that the evidence adduced at the trial of this case clearly establishes that whatever superior position the respondents herein enjoy in the fleeting and switching business in the Port of Baton Rouge was acquired entirely by lawful means and by their application of superior technical skill and effective competitive activity, and that there is no showing of any kind in this case that respondents, or any of them, employed the use of coercion, threats, or other unlawful means to acquire or maintain the business which they currently enjoy. Petitioner has likewise failed to prove any conspiracy on the part of these respondents.
>
> "This Court further concludes, as a matter of law, that from the evidence presented during the trial of this case, the business failure experienced by petitioner, Clark Marine, resulted from its own under-capitalization, poor management, and ineptness in the business in which it was engaged, and that petitioner was in no way injured or damaged by any illegal activities on the part of these respondents." (Pet. App. 57.)

The Court of Appeals, agreeing with the District Court, affirmed. (Pet. App. 58.)

ARGUMENT.

The questions which the petition seeks to present are either not presented at all by the decisions below or turn upon the facts and circumstances of this case. No point of general importance possessing any merit is raised, nor is there any conflict of decision.

The fourth question on its face merely challenges a District Court Finding of Fact, which the Court of Appeals approved—the finding that CCI had obtained its "dominance" (that is, most of the business) in the fleeting and switching of grain barges in Baton Rouge because of superior service and management. This finding is overwhelmingly supported by the evidence (see pp. 3-4, *supra*), and we shall say no more about it.

A. The courts below did not apply a different criterion to petitioner because it was bankrupt, or improperly consider the evidence as to the reasons for petitioner's losses.

Petitioner's first point is that the evidence as to Clark Marine's mismanagement and under-capitalization is irrelevant to defendants' liability under the Sherman Act, when the question of the amount of damages was reserved for a subsequent hearing if liability were found.

Petitioner frames the question in terms of a different criterion of proof being applied to bankrupt plaintiffs. Contrary to petitioner's assertion (p. 19), the courts are not "in hopeless conflict" on this proposition, nor do any cases apply separate criteria to plaintiffs that are in bankruptcy. Nor did the courts below.

What the District Court did do was to admit evidence, mostly without objection,[8] as to petitioner's losses being caused by its own deficiencies, and to conclude (Pet. App. 57) that the evidence showed that Clark Marine's business failure "resulted from its own under-capitalization, poor management and ineptness" and not from the alleged illegal activities of the defendants.

The petition (p. 22) correctly states that as a result of the splitting of the issues the questions first to be tried were "whether or not defendants were singularly or jointly guilty of a violation of the Sherman Anti-trust Act and *whether the plaintiff suffered as a result* of such illegal actions" (italics supplied), but that "how much Clark suffered" is not in issue. The provision for treble damage suits in Section 4 of the Clayton Act allows recovery only to a person "injured in his business or property by reason of anything forbidden in the anti-trust laws" (15 U.S.C. §15.) A plaintiff's right of action depends both on proof of violation and of "damage to the individual plaintiff resulting proximately from the acts of the defendant which constitute a violation of the law." *Association of Western Railways* v. *Riss & Co.*, 299 F.2d 133, 135 (C.A. D.C., 1962), cert. den. 370 U.S. 916; *Hud-*

[8] Much of this consisted of petitioner's own financial records and files (Def. Ex. 33-47, 72, 84, 24-32) to the admissibility of which no objection was made. Rule 14 of the Court of Appeals provides that exhibits not objected to at trial may not be objected to on appeal. And Mr. Benton himself, president of Clark Marine before and at the time of its bankruptcy, testified to its "awful financial shape" before the move down from Devil's Swamp (R. 796; see R. 786-800) without objection on the ground now raised. Petitioner is in error in asserting that it had objected to such evidence at the unreported pretrial conference.

son Sales Corp. v. *Waldrip,* 211 F.2d 268, 274 (C.A. 5, 1954). "The *fact* of injury [causally connected with the defendant's wrongful act] must first be shown before the jury is allowed to estimate the *amount* of damage." *Flintkote Company* v. *Lysfjord,* 246 F.2d 368, 392 (C.A. 9, 1957), cert. den. 355 U.S. 835 (italics in original). See also *Story Parchment Paper Co.* v. *Paterson Co.,* 282 U.S. 555, 562 (1931); *Keogh* v. *Chicago & Northwestern R. Co.,* 260 U.S. 156, 162-63 (1922).

The proof that petitioner's losses were due to its own ineptitude was evidence that such losses did not result proximately (or otherwise) from the acts of the defendants. Thus the evidence and findings on this subject pertained to an element essential to the establishment of defendants' liability, and not merely to the amount or quantum of damages.[9]

The absence of evidence of any other cause of petitioner's failure would have permitted petitioner to argue that the losses were attributable to defendants' acts. Defendants thus clearly had the right to introduce evidence which would prevent the drawing of such an inference.

A similar point was raised in *Buckeye Powder Co.* v. *Du Pont Powder Co.,* 223 Fed. 881 (C.C.A. 3, 1915), affirmed 248 U.S. 55 (1918). Defendant there:

> ". . . insisted that the plaintiff's troubles were due to its own faults or blunders, such as improper organization, lack of capital, insufficient experience, in-

[9] The pretrial order was careful to differentiate between "(g) whether plaintiff was directly or proximately injured by any of the alleged acts", and "(h) assuming all of the foregoing issues are resolved in favor of plaintiff, whether plaintiff is able to prove the amount of any damages." (R. 25.) The latter question but not the former was reserved for a later hearing, if necessary.

> attention to business, misrepresentations to customers, inability to fill orders, and furnishing bad powder. A great deal of the record is devoted to this branch of the dispute, . . ." 223 Fed. at 885.

The jury returned a verdict for defendants, and the judgment entered upon the verdict was sustained by the Court of Appeals and this Court. Objection was made to a portion of the charge to the jury to the effect that petitioner's motives in going into the business might be relevant to the question of liability. The Court rejected this contention on the ground that petitioner's motives "might have bearing on the question whether the petitioner was sufficiently capitalized to meet normal conditions," and that the jury might consider the evidence "on the question whether the petitioner's failure was due to the defendant's oppression or to the petitioner's incapacity. . . ." (248 U.S. at 64.)

The evidence here of petitioner's financial history, which revealed that petitioner's losses were due to its own bad planning and inefficiency, was thus admissible to show that the losses incurred did not result "proximately from the alleged unlawful acts" of the defendants but were due to "petitioner's incapacity," as in the *Buckeye* case. Since the court could conclude from this and other evidence that Clark Marine's losses were not attributable in any way to defendants' allegedly unlawful acts, the evidence in question related to an essential element of petitioner's case and was thus clearly admissible.

The petition alleges a conflict between the *Buckeye* decision and that of the District Court in *United Exhibitors* v. *Twentieth Century Fox Film Distributing Corp.*, 31 F. Supp. 316 (W.D. Pa., 1940). But nothing in the *United Exhibitors* case held irrelevant evidence that a plaintiff's losses were not caused by the defendant. In a short opinion the District Court merely denied a motion to dismiss

a complaint which "alleges damage to property and business" (p. 317). The District Court went on to say that:

> "if no specific damages were shown by an established conspiracy, at least nominal damages would accrue to plaintiffs, as well as the injunctive relief prayed."

But this is not a holding that no injury need be shown to establish a cause of action under Section 4. In any event, a District Court dictum contrary to holdings of this Court and many courts of appeals would not be grounds for certiorari.

B. The evidence shows that the barge lines were not induced to and did not patronize CCI's Baton Rouge fleet because CCI was also a customer for barges.

Petitioner has abandoned the theory of its complaint that defendants threatened barge lines with the loss of grain barge traffic if they would not allow CCI to fleet and switch for them in the Port of Baton Rouge. The District Court's finding that "these contentions . . . were in no way proved" (Fdg. 20, Pet. App. 52) was compelled by a mass of uncontradicted testimony.

Petitioner has attempted to save its case by changing its theory. It claims that the barge lines, without any pressure from defendants, were nevertheless induced by CCI's status as a customer for their barges to use the CCI fleet rather than petitioner's, and that for CCI to benefit from this constitutes a violation of the Sherman Act by CCI. This argument is both unsupported by the facts and unsound in law.

In the first place, the record does not support the claim that the barge lines turned to CCI's fleet because it was a customer for their barges. As shown, *supra,* and in Findings 7, 8 and 9 (Pet. App. 44-47), the record establishes that CCI acquired most of the grain barge fleeting business in

and after 1959 because its predecessors were extremely inefficient and because it provided superior service. Clearly for a company merely to be the only business in a small market incapable of supporting "two or more companies" unless they also engage in "other business activities, of a profitable nature" (Fdg. 18, Pet. App. 51) is not improper in any way, and does not violate the antitrust laws when this position is achieved only by legitimate competitive methods. Thus the single barber or newspaper in a town which can only support one is not unlawful, even if by ordinary competitive methods he tries to get or keep all the business. Or to take an example used in the debates on the Sherman Act, a man who by "superior skill * * * got the whole business because nobody could do it as well as he could was not a monopolist," unless he used "means which made it impossible for other persons to engage in fair competition. . . ." (21 Cong. Rec. 3152.) As Judge Learned Hand said in *United States* v. *Aluminum Company,* 148 F.2d 416, 430 (C.A. 2, 1945):

> ". . . A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. * * * The successful competitor, having been urged to compete, must not be turned upon when he wins."[10]

Petitioner did not obtain a towboat until March of 1961. It "vigorously" disputes (Pet. p. 15) the trial court's

---

[10]See to the same effect *United States* v. *Paramount Pictures,* 334 U.S. 131, 171 (1948); *Union Leader Corp.* v. *Newspapers of New England, Inc.,* 284 F.2d 582, 584 (C.A. 1, 1960), cert. den., 365 U.S. 833; *American Football League* v. *National Football League,* 323 F.2d 124, 131 (C.A. 4, 1963); *John Wright & Associates* v. *Ullrich,* 328 F.2d 474 (C.A. 8, 1964); *Scott Publishing Co.* v. *Columbia Basin Publishers,* 293 F.2d 15 (C.A. 9, 1961); *United States* v. *du Pont & Co.,* 118 F. Supp. 41, 215 (D. Del., 1953), aff'd on other grounds 351 U.S. 377 (1956); *United States* v. *Harte-Hanks Newspapers, Inc.,* 170 F.Supp. 227, 229 (N.D. Tex., 1959).

finding (Fdg. 12, Pet. App. 48) that its location at Devil's Swamp, seven miles above the grain elevator, was responsible for its inability to compete for grain barge traffic between March and September, 1961. But this was so thoroughly established by the testimony of petitioner's own witnesses that the court shut off further testimony on the point as cumulative. (R. 635.) Even in the absence of oral testimony, it would seem obvious that a maritime parking lot seven miles from the elevator to which the grain barges had to be towed for unloading could not compete with a lot next door, any more than an automobile parking lot one mile from a theater could attract the cars of the theater-goers if another lot was located next to the theater.[11]

Petitioner admits (Pet. p. 14) that during this period it "had no fleeting business of barges whatsoever", though it was "immediately adjacent" to the barge terminal on the canal on which it was located. But it does not appear that there was any appreciable traffic to this terminal.[12] Whether there was or not is immaterial, since

---

[11] The record shows the importance of proximity in the Baton Rouge area. Just as CCI and eventually petitioner handled the bulk of the grain barge fleeting and switching business because their fleets were close to the elevator, Baton Rouge Coal & Towing Co. retained the bulk of the petro-chemical business because its fleet, two miles or so upstream, was closest to the petro-chemical plants. CCI got very little of this traffic.

[12] Petitioner's statement (p. 14) that "it was immediately adjacent to the Baton Rouge barge canal dock where some 289 barges, more or less were docked during the year 1961" confuses the general cargo dock near the center of Baton Rouge, which had a substantial volume of business, with the barge terminal dock at the end of the Devil's Swamp canal which had little or none. The 289 barge figure comes from a table which lumped the two together as "all other general docks [excluding the grain elevator] under jurisdiction of the greater Baton Rouge Port Commission." (Pl. Ex. 11.)

CCI did not get it. CCI only "moved two barges up there" during that period (R. 443), and thus could not have been the cause of petitioner's inability to secure whatever barges were destined for the Devil's Swamp area.

The period from September, 1961, to May, 1962, when petitioner went into bankruptcy, was the only time in which petitioner was so located as to be competitive with CCI. As shown above, within a few months it had obtained over 40% of the barge line business. This in itself proves that the barge lines were not "inevitably" induced to use CCI's fleet by CCI's dual position. In the absence of proof that petitioner's service was superior in any noticeable respect, 40% was a very good showing for a new competitor.

The proof that the barge lines dealing with petitioner's fleet did not lose their share of CCI's shipments during this period proves CCI's good faith in notifying them that it would not consider whether a barge line fleeted with it in the allocation of barge bookings. And the evidence as to the shortage of barges shows that CCI—which needed only about 2% of the barges on the river—did not possess the economic power which might have caused the barge lines to feel, without being told, that they must use its fleet in order to keep their barges moving.

Thus in none of the periods to which petitioner refers was there either monopoly power, use or misuse of monopoly power, intent to monopolize, or any restraint or improper act whatsoever.

Petitioner's theory is that because CCI entered the fleeting business in Baton Rouge while continuing to be a barge line customer, CCI became an unlawful monopolist since its dual status might have caused barge lines to favor its fleet without any pressure on its part. Even if, contrary to what the record shows, the barge lines had done this, no antitrust violation *by defendants* would have been established.

What petitioner's position comes down to is that merely for CCI to engage in the two activities at the same time is unlawful. That means that no matter how inefficient the service provided by the companies performing the fleeting in Baton Rouge prior to April 1959, or how costly their inefficient operations were to CCI and the Cargill elevator, it was unlawful for CCI to undertake to provide an improved service because it would then be occupying what petitioner calls a "dual role." Nothing like that has ever been held to be unlawful monopolization or restraint of trade.

No authority even remotely suggests that the mere occupancy of a position whereby reciprocal dealing in different commodities or services can occur violates the Sherman Act. The closest case is one of three early Federal Trade Commission proceedings[13] against companies which sought to compel others to buy one product or service from them if it wished to sell them another. In the *California Packing* case, the packing company was a large shipper over steamship lines and also owner of a terminal on San Francisco Bay; it sought to compel the shipping lines to use its terminal by threats that it would not patronize them if they did not do so. The case is thus very much the same as that originally alleged by petitioner here. The Federal Trade Commission found the coercion and compulsion unlawful, but specifically provided in its order that nothing should prohibit the packing company from also engaging in the terminal business so long as it made no effort to take advantage of its status

[13] *California Packing Corp.*, 25 F.T.C. 379 (1937); *Waugh Equipment Co.*, 15 F.T.C. 232 (1931); *Mechanical Manufacturing Co.*, 16 F.T.C. 67 (1932).

as a shipper of freight. Thus the Commission found it not unlawful for a company to be both a large shipper and a terminal operator, the very situation about which petitioner complains here.

Indeed, it must be obvious that the mere existence of reciprocal trading possibilities cannot be illegal. They exist throughout the economy. Railroads transport automobiles and auto parts and trucks and steel and oil and at the same time are large purchasers of automotive equipment, steel, and oil. Manufacturers sell equipment and material to carriers who sell transportation service to them. Lawyers serve carriers and are served by them. The mere existence of these dual relationships cannot be and has never been held unlawful.

Reciprocal dealing has been treated as akin to a tying arrangement, a kind of tying clause in reverse. Just as it was unlawful for IBM to require customers for its machines to buy from it the cards to be used in the machines (*International Business Machines Corp.* v. *United States,* 298 U.S. 131 (1936)), it would be unlawful for IBM to require sellers of paper or other materials to it to agree to use its typewriters or other machines. But it has never been suggested by the Government, the courts, or anyone else that it is unlawful for IBM to sell cards or to buy materials at the same time that it is selling machines. And this is so even though, without pressure from IBM, the user of its machines would be more likely to buy cards from it, or even though the paper manufacturer would be more likely to use IBM typewriters if IBM bought its paper.

The cases cited by petitioner all involved misuse of monopoly power. *United States* v. *Griffith,* 334 U.S. 100 (1948), upon which petitioner heavily relies (Pet. pp. 28-29), was clearly a case in which monopoly power was *used* to restrain competition. The Griffith chain of theatres entered into over-all licensing agreements giving the chain's

theatres preferential treatment, and thereby preventing competitors from obtaining sufficient first-run films (p. 103). These agreements were on their face exclusionary insofar as the preferential runs were concerned. "Monopoly rights in the form of certain exclusive privileges were bargained for and obtained" (p. 109). Threats or other extrinsic evidence of intent to exclude were obviously superfluous. The "necessary and true result of the master agreements" (p. 106) was to restrain and monopolize trade.

Petitioner argues (Pet. p. 29) that *Griffith* holds that threats to withhold business are unnecessary. But the statement in *Griffith* as to the absence of threats must be read in light of the fact that monopoly power was there used to secure exclusionary contracts which on their face harmed Griffith's competitors. Indeed, the very passage which petitioner quotes in bold face, and also the paragraphs which follow (334 U.S. at 107-09), contain repeated references to the *use* of *monopoly* power in order to stifle competition.

Neither *Griffith* nor any other case suggests that a company which is a large buyer of services from others may not lawfully undertake a new line of activity which may attract customers who hope thereby to induce the company to patronize them. And it makes no difference whether this possible benefit may result directly as in *Griffith* or reciprocally as is said to be the case here.

We add that *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592 (1965), to which petitioner refers in another connection, in no way supports petitioner's position. As this Court knows, *Consolidated Foods* was a Section 7 merger case.

"Section 7 of the Clayton Act is concerned 'with *probabilities,* not certainties.' * * * Reciprocity in trading as a result of an acquisition violates § 7, if the *probability* of a lessening of competition is shown." (380 U.S. at 594-95. Italics supplied.) The test in a suit for treble damages for violation of Sections 1 and 2 of the Sherman Act, however, is entirely different. The plaintiff must establish that the defendant actually restrained trade or monopolized in violation of those sections and that plaintiff has been injured thereby. In order to sustain a recovery of damages, it clearly is not enough to prove merely a probability that competition may be restrained in the future.

Furthermore, in the *Consolidated* case the Court stated that the evidence supporting the Commission included evidence that "reciprocity was tried over and again and it sometimes worked" (p. 600). The Court was thus dealing with a deliberate attempt to take advantage of the reciprocal buying situation created by the merger. Indeed, the company there argued only that the attempt had failed, and that the experience after the merger showed that competition was not lessened thereby. In the instant case there was no evidence that defendants tried to take advantage of the reciprocal possibilities. On the contrary the testimony showed that it was not CCI's policy to do this, and the trial court found, on the basis of the testimony of many witnesses, that no such attempt was made.

Nothing in the *Consolidated Foods* opinion suggests that a company, without merger but by direct expansion, may not lawfully enter a new line of business merely because the result may be that it buys one product or service from a company to which it sells another.

C. The lower court did not err in excluding, on the basis of an objection initiated by petitioner, some evidence as to statements made to the person who took over petitioner's fleet after petitioner's bankruptcy.

Petitioner urges error in a limitation upon its examination in rebuttal of a witness, Prewitt Nelson, who had been a stockholder, officer and director of petitioner and whose company took over the fleet at Red Dog Landing after petitioner's bankruptcy. The contention is that petitioner was precluded from introducing evidence that several barge line representatives had told Nelson, after petitioner had ceased operations, that they would not give Nelson their fleeting and switching business because CCI used their barges in the shipping of its grain.

Proof that the barge lines had favored CCI for this reason should obviously have been introduced as a part of petitioner's affirmative case. Petitioner is complaining about the restriction put upon a rebuttal witness. Nelson was permitted to contradict the denial of a barge line witness that Nelson had been told any such thing. (R. 859-62, 884.) As to events relating to Nelson's business, testimony not in specific rebuttal of anything introduced by the defendants was barred by the trial court for good reason.

For petitioner, not defendants, was originally responsible for the ruling excluding evidence as to Nelson's operation after petitioner had gone out of business. Petitioner is not now entitled to complain of subsequent rulings based upon the one which it caused the court to make. During the pretrial proceeding when defendants sought to subpoena the records of Nelson's company, the court sustained *petitioner's* objection on the ground that this was a needless imposition on Nelson for a period irrele-

vant to the case. (R. 55-56.)[14] Throughout the trial the court adhered to this position, first urged upon it by petitioner, on the ground that it would be unfair to change the ruling after barring defendants from ascertaining the facts as to Nelson's operation during that later period. (R. 876.) Since the documents which defendants were precluded from subpoenaing could have established that Nelson's company obtained business from barge lines contrary to the alleged statements of their representatives to Nelson, it would have been prejudicial to defendants and erroneous for the trial court to have admitted Nelson's testimony after having excluded the subpoenaed documents on petitioner's objection.

Furthermore, the testimony in question related to a period after petitioner had ceased doing business and petitioner could not have suffered damage as a result of anything occurring in the period to which the testimony relates. Whether testimony as to events happening after the period involved in the case is pertinent to prove the policy of the barge lines during that period is a matter within the discretion of the trial court. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 230 (1940).

In any event the evidence which petitioner sought to introduce would not have affected the result, as the court below found. An offer to prove what such testimony would have been was incorporated in a deposition taken about six months after the end of the trial (three months after the entry of judgment and one month after the notice of

---

[14] The petition concedes (p. 33) that petitioner objected to the subpoena served upon Nelson by defendants at the opening of the case, but states (pp. 32-33), without supporting record reference, that during the pretrial proceedings the trial court initiated on its own motion the exclusion of evidence as to the post-bankruptcy period. Nothing in the record substantiates this statement, and it is not correct.

appeal). The Court of Appeals, though concluding that this deposition should not have been considered, also was "of the opinion that a consideration of it would not in any way affect the disposition of the appeal." (Pet. App. 58.)

In so deciding, the Court of Appeals was clearly correct. For the most that the post-trial deposition, taken as an offer of proof, showed was that two representatives of barge lines which were using CCI's fleet indicated that they would be influenced by CCI's status as a shipper in determining whether they would deal with Nelson's fleet. There was no suggestion that Cargill or CCI made any effort to take advantage of their dual position. Nor does the deposition establish that *any* barge line, while Clark Marine was in operation, or any other barge line after Nelson's company took over the fleet, was so influenced. As we have shown, some originally chose to use the CCI fleet in 1959 because of its superiority to its then competitors and stayed with it because they did not believe that the service subsequently offered by petitioner was any better. Others, and among them some of the largest lines on the river, switched to petitioner when it opened its fleet at a competitive location and thereafter remained with Nelson's company without loss of CCI barge bookings.

Whether the Nelson offer of proof should have been received clearly involves no question of importance worthy of review.

CONCLUSION.

For the above reasons the petition for certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN
ERWIN C. HEININGER
LAURANCE W. BROOKS
Attorneys for Respondents